90-1540
No. _____
Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1990

ARNOLD WEISS, ESQUIRE,

Petitioner,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York branch thereof; JOHN T. KEAN, Individually and as an Officer and Manager thereof; MARINE MIDLAND BANK, N.A. (formerly Marine Midland Bank-Western),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are of overriding importance to the integrity of the federal judicial process. They are:

(1) Whether a federal judge, whose disqualification is sought on the ground that he and his wife sought and obtained financial and other improper favors from a party in a case before him, and who is alleged to be biased towards the lawyer who moved for his disqualification on that ground, may, compatibly with the due process clause and federal law, rule himself on whether he should be disqualified rather than refer the application for disqualification to another judge;

(2) Whether this judge may impose on the lawyer, who sought his disqualification on that ground, sanctions under Rule 11 of the Federal Rules of Civil Procedure for having made a groundless motion rather than refer the application for sanctions to another judge;

(3) Whether a federal court of appeals, reviewing a judge's denial of a motion that he disqualify himself, should reverse that judge's order excluding from the record on appeal those parts of the record below that relate to the judge's and his wife's wrongdoings and, in any event, must include those parts in the record on appeal itself;

(4) Whether, under 28 U.S.C. §455(a), a lawyer may seek disqualification of a judge who is biased towards the lawyer.

LIST OF PARTIES

The names of all of the parties involved on this Petition appear in the Caption of the case.

Petitioner, who is an attorney at law and a member of the Supreme Court Bar, acted *pro se* in the District Court in opposing the sanctions and seeking the District Judge's recusal and was the sole appellant to the United States Court of Appeals for the Second Circuit.

Respondents, who were defendants in the District Court, are the Federal Reserve Bank of New York (and its officers), which is affiliated with the Federal Reserve Bank.

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IN THE

Supreme Court of the United States

No. _____

October Term, 1990

ARNOLD WEISS, ESQUIRE,

Petitioner,

vs.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York branch thereof; JOHN T. KEAN, Individually and as an Officer and Manager thereof; MARINE MIDLAND BANK. N.A. (formerly Marine Midland Bank-Western),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

None of the Decisions of the United States Court of Appeals for the Second Circuit involved on this appeal have been reported. They appear in Appendices A and B.

The District Court's Decision appealed from in this case was reported at 129 FRD 462. None of the other District Court's other Decisions or Orders in this case have been reported. They are included in Appendices C, D, E, F, G, H and J.

The District Court's Opinion in the prior recusal case of *Markel v. Scovill* was reported at 657 F.Supp. 1102.

The Court of Appeals' Order vacating the judgment for sanctions in the *Markel* case was reported at 859 F2d 148. It appears at Appendix I.

JURISDICTIONAL STATEMENT

i) The judgment of which reversal is sought was issued on October 26, 1990 by the United States Court of Appeals for the Second Circuit (Circuit Judges J. Daniel Mahoney and John M. Walker, Jr., and District Judge John S. Martin, Jr.)

ii) Petitioner's timely Petition for Rehearing, with a suggestion for a rehearing *en banc*, was denied on January 7, 1991.

iii) This Court has jurisdiction to review the judgment below by writ of certiorari by virtue of 28 USC 1254(1), §§2106 and 2111.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are reproduced in Appendix K. They are cited below by reference:

1. U. S. Constitution, Amendment V (due process)

2. 28 USC §455(a) and (b)(1) and (c)—Disqualification of justice, judge or magistrate

3. Federal Rules of Civil Procedure:

—Rule 11: Signing of Pleadings, Motions and Other Papers: Sanctions

—Rule 37: Failure to Make or Cooperate in Discovery: Sanctions

(b) Failure to Comply with Order
(2) Sanctions by Court in which action is pending
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4. Federal Rules of Appellate Procedure:

—Rule 10: The Record on Appeal

(a) Composition of the Record on Appeal
(e) Correction or Modification of the Record

STATEMENT OF THE CASE

Petitioner urges review of the Second Circuit decision that, if left standing, would do significant harm to the integrity and reputation of the federal judiciary.

In this case, a federal district court judge, accused of having solicited and obtained through his wife substantial financial and other improper favors from a party in a case before him, (App. L, 39a-64a), and of being biased against the lawyer who moved for his disqualification on that ground, (App. M, 65a-86a) consistently endeavored to escape the proper consequences of his extra-judicial misconduct.

The judge did so by reformulating the charges made against him into more innocuous ones (App. 11a-15a; 657 F.Supp. 1102), and, by excluding from the Record on Appeal under FRAP 10(a) those parts of the duly "filed papers" below that contained the accurate specifications of his misconduct, (App. D, 22a; App. M, 87a-95a), and by then refusing to disqualify himself (App. 11a-15a).

Thereafter, the district judge aggravated the impropriety of his conduct by assessing a Rule 11 sanction on the lawyer personally for having made a "groundless" recusal motion, (App. 19a-21a) and by also converting a Rule 37 monetary discovery sanction, which he had 10 years earlier imposed on the lawyer's client, into a Rule 11 sanction imposed on the lawyer personally (App. 20a-21a).

The Second Circuit rejected the lawyer's appeal. Relying on the judge's reformulation of the lawyer's charges, it affirmed the judge's decision. It also rejected Weiss' argument that the judge should have referred to another judge both the disqualification motion and the motion to impose sanctions for having made the disqualification motion groundlessly (App. 2a-8a).

Although this argument raised questions of first impression, and of overriding importance to the Bar and the Bench, the Second Circuit directed that its decision should neither be published nor be cited or relied on (App. 8a). The attorney's petition for a rehearing also was denied (App. 1a).

In a prior case, *Markel v. Scovill* (657 F.Supp. 1102; vacated 859 F2d 148), Weiss, the lawyer, had sought disqualification of the district judge on the ground that the judge and his wife had sought—and obtained—financial and other substantial favors from a person the judge knew to be a party, represented by Weiss, in a case then pending before him (App. 39a-64a).

Weiss' application was based on §455(a) of Title 28 of the United States Code, requiring disqualification when the judge's impartiality "might reasonably be questioned" (App. 51a, 65a-86a).

It alleged that the judge's wife, with the judge's concurrence, had asked for, and received, substantial discounts of up to 50% on substantial purchases of flowers and wedding decorations for the weddings of three of the judge's daughters, and that the judge's wife, with the judge's concurrence, had also importuned the florist, who was the plaintiff in the case, to give one of their daughters part-time employment over two summers, even though the florist did not need a part-time employee. The amounts involved ran into thousands of dollars of purchases and discounts or benefits (App. 39a-73a). When Weiss learned of this, he wrote to the judge (App. 53a) and requested that he recuse himself. The judge waited a few months and wrote Weiss asking for his "final word on the recusal problem" (App. 55a). Mr. Weiss reiterated the recusal request (App. 57a).

The judge in that case did the same thing he has done in the case at bar. He restated the charges of having received improper financial favors as being only charges of having purchased flowers from the florist. He then ruled those reformulated charges insufficient, refused to recuse himself, and imposed sanctions upon Weiss (657 F.Supp. 1102 [WDNY, 1989]; *vacated*, 859 F2d 148 [2 Cir., 1988]).

Weiss appealed the judge's decision to the Second Circuit. The case was briefed and argued, and the parties were awaiting the Second Circuit's decision.

Then, something most unexpected happened (App. 87a). The judge "spontaneously" wrote the Second Circuit informing that Court that he had "read the appellate papers (Briefs and Joint Appendix) filed by the parties" and had come to the conclusion that he would like to "reconsider" his decision refusing to recuse himself. He requested the Second Circuit to return the mandate (App. 33a). The Second Circuit thereupon "vacated the judgment" (859 F2d 148; App. 31a) and remanded the case.

Thereafter, the judge retracted this earlier decision and recused himself (App. 29a). However, he failed to indicate in any way why he had changed his mind. Most importantly, he did not indicate the basis for his decision, *i.e.*, whether he *now* admitted the truth of the charges *actually* made by Weiss, or whether he had concluded that *merely* purchasing flowers was adequate ground for recusal (App. 33a & 29a).

Since the latter would appear most improbable, it would be reasonable to assume that the judge had finally come to the correct conclusion that soliciting and obtaining any financial favors whatsoever from a party in a case before him constitutes (more than) adequate ground for recusal.

When the judge was asked to sanction Weiss in the case at bar, Weiss moved that he recuse himself on the grounds advanced in the *Markel* case—and based on his belated recusal on appeal in the *Markel* case. Weiss claimed that after what had happened in the *Markel* case, the judge could not be unbiased, and his impartiality towards Weiss might reasonably be questioned (App. 65a-86a).

The judge repeated exactly what he had done in the *Markel* case. He again reformulated the charges of his extra-judicial misconduct in the same way he had done in the *Markel* case (App. 5a, 10a-15a, 27a). Then, without addressing the charges *actually* made by Weiss, he refused to recuse himself (App. 15a).

What is more, the judge then also assessed a monetary Rule 11 sanction upon Weiss for having made a groundless motion for recusal (App. 19a-21a). In addition, he converted a Rule 37 sanction against Weiss for improper cooperation in discovery, which he had *ten years* earlier imposed on Weiss' client, into a sanction imposed on Weiss personally (App. 20a-21a).

The Second Circuit affirmed in an unpublished opinion. It did so by relying on, and adopting, the judge's misstatement of the grounds for recusal, and by incorrectly stating the gounds for recusal to be that "one of his (*i.e.*, the judge's) daughters had worked part-time for a brief period at a flower shop owned by (Weiss' client) Markel, and three of the judge's daughters bought flowers for their weddings at Markel's shop" (App. 2a-8a). These clearly were *not* the grounds Weiss had urged (App. 27a-28a, 65a-71a, 74a-79a, 39a-64a).

The actual charges made—and those that were made in the *Markel* case and caused the judge's recusal—were that the judge's wife, with the judge's knowledge and

consent, had repeatedly solicited and obtained 50% discounts and floral purchases and wedding decorations, and that the judge's wife had solicited and obtained part-time employment for her daughter from Markel over two summers, even though Markel had no part-time position open, had no need for a part-time employee, and had employed the daughter only to accommodate the judge and his wife. These specifications of the charges had been duly filed as Docket Item Nos. 167 and 168 (App. 25a) and were considered by the judge in denying recusal (App. 23a). However, when Weiss requested that the district court clerk include those specifications in the Record on Appeal under FRAP 10(a), the judge issued an Order directing the clerk of the court to exclude them from that record (App. 22a, 89a-95a).

Weiss urged the Second Circuit to supplement the record on appeal under FRAP 10(e) with the portions excluded by the judge in violation of FRAP 10(a). However, it did not do so. It merely reiterated the sterilized charges reformulated by the judge and found that the judge had not abused his discretion in concluding—despite his earlier recusal on the same grounds in the *Markel* case—that these expurgated charges were inadequate grounds for recusal (App. 5a-6a). In so ruling, the Second Circuit relied on its interpretation of 28 USC §455(a) that: "[B]ias against a lawyer is only a concern if it leads to bias against a party represented by the lawyer", *even* where, as here, the lawyer is defending a motion to impose Rule 11 sanctions on him (App. 6a).

The Second Circuit also rejected Weiss' contention that the judge should have referred to another judge both the disqualification motion and the motion to impose Rule 11 sanctions (App. 7a). It thus refused to follow this Court's consistent rulings that a judge should not sit in judgment on his own alleged wrongdoings.

REASONS FOR ALLOWANCE OF THE WRIT

The important questions here presented go to the heart of the integrity of the judicial process. They have never been presented before, and it is essential that they be settled by this Court.

> I. Should a judge whose disqualification is sought on the ground of his own extra-judicial misconduct, and his personal bias against a lawyer refer the matter to another judge rather than rule on allegations of his own misconduct?

In this case, the judge's disqualification was sought on the ground that he and his wife had solicited and obtained improper financial and other substantial favors from a party in a case before him, and that he was biased against Weiss. Even the expurgated version of the charges formulated by the judge leaves no doubt that they alleged misconduct by the judge and his wife.

It is a universally accepted rule that a judge may not adjudge his own case: *nemo iudex in sua re.* It is one of the principles accepted by all civilized nations. See Lauterpacht, *Private Law Sources and Analogies of International Law,* 204 (1927), *Cheng, General Principles of Law Applied by International Courts and Tribunals,* 150 (1953). It has also been endorsed repeatedly by this Court. It has been applied not only in contempt cases (see, *e.g., Offutt v. U. S.,* 348 US 11 (1954), *Mayberry v. Pennsylvania,* 400 US 455 (1971)); but also in disqualification cases (see, *e.g., Aetna Life Ins. Co. v. Lavoie,* 475 US 813 (1986)). The Second Circuit erred when it limited the application of that principle to criminal contempt cases (App. 7a).

The precise question of the proper procedure in a recusal case presented here has never been addressed by this Court. The issue is whether a judge confronted by a

disqualification motion alleging his own misconduct and personal bias as the grounds for disqualification must refer the motion to another judge—especially after he already has recused himself on the same grounds (App. 33a, 31a, 96a-98a).

Petitioner contends that both the due process clause and well-established principles of federal law require such a reference to another judge. The commentators are largely in accord. See, *e.g.*, Redish & Marshall, *Adjudication Independance and the Value of Procedural Due Process*, 95, Yale L.J. 455, 504-05 (1986); Hoekema, *Questioning the Impartiality of Judges*, 60 Temple L.Q. 662, 729 (1987). It is most important that this Court address this question, for it concerns the very integrity of the judiciary. Public confidence in the judiciary is undermined when judges pass upon allegations of their own wrongdoing.

> II. Should a judge whose disqualification is sought on the ground of his extra-judicial misconduct and personal bias, refer the question of whether Rule 11 sanctions should be imposed on the lawyer making the motion to another judge rather than rule on the sanction motion himself?

The very reasons that mandate that a judge not pass himself on a motion seeking his disqualification on the ground of his extra-judicial misconduct require, *a fortiori*, that that judge not impose sanctions on the lawyer who made that motion. The appearance that the judge may seek to get even with the lawyer questioning the propriety of the judge's conduct should be avoided at all costs.

This question also is a novel question that has not been presented to this Court before. It is essential that it be addressed by the Court, especially in view of the growing judicial propensity to impose Rule 11 sanctions.

III. Must a federal court of appeals reverse a district judge's refusal to include in the Record on Appeal under FRAP 10(a), and, in any event, must the Court of Appeals itself include under FRAP 10(e), the duly "filed" papers below that bear upon the disposition of a motion to disqualify a judge for improper extra-judicial conduct and personal bias, and on the imposition of Rule 11 sanctions on the lawyer who made the recusal motion?

The case at hand provides a vivid demonstration of a district judge's efforts to remove from the Record on Appeal material that may embarrass him. The judge twice wrote opinions—in the *Markel* case and in this case—in which he reformulated the charges against him to be quite different from what they actually were.

Instead of acknowledging that the charges were that his wife, with his concurrence, had solicited and obtained substantial financial favors and unwanted employment for their daughter, the judge attempted to minimize the charges to be that his wife purchased flowers from, and that his daughter worked part-time for, a party in a case before him *(Markel v. Scovill,* 657 F.Supp 1102, *vacated* 859 F2d. 148; App. 5a, 10a-15a). When Weiss moved under FRAP 10(a) to include in the Record on Appeal the duly "filed" and docketed Binders A and B (Docket Items 167 and 168; App. 23a, 89a-95a) in specification of the charges involved on the record below, the judge directed that these materials be excluded from the Record on Appeal (App. 22a, 89a-95a).

Petitioner urged the Second Circuit to supplement the Record on Appeal, pursuant to FRAP 10(e), with the excluded parts, but the Second Circuit failed to do so. It merely reiterated the expurgated versions of the charges set forth in the decisions appealed from (App. 5a).

Petitioner contends that in the situation presented, both the court of appeals, and the district judge, were under a constitutional, and statutory, obligation to have a true Record on Appeal. It was a violation of the due process owed to petitioner, and of the proper application of the recusal statutes, for the Court of Appeals to condone the judge's action in expurgating the charges from the Record on Appeal under FRAP 10(a).

In any event, it was an abuse of the Court's discretion not to bring up these materials under FRAP 10(e).

These are also questions that have never before been put to this Court, but are in imperative need of resolution if the public's confidence in the judiciary is to be preserved.

IV. Under 28 USC §455(a), is a lawyer entitled to disqualification of a judge who is biased against him?

In this case, the Court of Appeals ruled that Weiss was not entitled to seek the judge's disqualification on the ground that the judge was biased against him. The Court ruled that only bias against a party requires disqualification, and that bias against a lawyer does not necessarily involve bias against the party that lawyer represents (App. 6a).

That ruling conflicts with the clear text of 28 USC §455(a). Section 455(a), in contradistinction to §455(b), does not require bias against a party. All it requires is that the judge's impartiality might reasonably be questioned. Under this statutory test, bias towards a lawyer suffices. This is entirely proper. The case at hand provides a dramatic illustration.

Weiss is the lawyer who complains of bias. He claims that the judge's bias resulted in the imposition of substantial sanctions upon him. He is the alleged victim of the judge's bias. He should have, and under §455(a) does have, the right to have the judge disqualified.

The Court of Appeals' conclusion is not only in clear conflict with the statutory text, but also with the Congressional purpose in its 1974 Amendment to §455(a) by P.L. 93-512 §1, 88 Stat. 1609. This purpose was to provide broadly for disqualification whenever a judge's impartiality might be questioned.

CONCLUSION

Petitioner submits that the Supreme Court of the United States should issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review, reverse and remand that Court's decision affirming the district court's order denying the motion to disqualify Judge Curtin and imposing Rule 11 sanctions on petitioner for moving for his recusal.

Respectfully submitted,

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APPENDIX A

Order of the United States Court of Appeals for the Second Circuit, filed January 7, 1991 (unreported), denying motion for rehearing with *en banc* suggestion

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED JAN 7 1991
ELAINE B. GOLDSMITH, CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 7th day of January, one thousand nine hundred and ninety-one.

DOCKET NUMBER 90-7336

GREATER BUFFALO PRESS,
Plaintiff,

v.

FED RESERVE, ET AL.,
Defendants/Appellees,

ARNOLD WEISS, ESQ.,
Appellant.

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by PLAINTIFFS GREATER BUFFALO PRESS.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH, Clerk

APPENDIX B

Opinion of the United States Court of Appeals for the Second Circuit, filed October 26, 1990 (unreported), affirming the District Court's order of January 26, 1990 which denied recusal and imposed Rule 11 sanctions

WDNY
78-cv-0027
Curtin

JDM

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED OCT 26 1990
ELAINE B. GOLDSMITH, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 26th day of October, one thousand nine hundred and ninety.

PRESENT: HONORABLE J. DANIEL MAHONEY
HONORABLE JOHN M. WALKER, JR.,
Circuit Judges.

HONORABLE JOHN S. MARTIN, JR.*
District Judge.

No. 90-7336

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* United States District Judge for the Southern District of New York, sitting by designation.

GREATER BUFFALO PRESS, INC., individually and as payee and holder; and on behalf of each other similarly situated payee and holder on Appendix A; of returned or non-paid checks or cash items drawn by NEISNER BROTHERS, INC., on CHASE LINCOLN FIRST BANK, N.A. (formerly the Lincoln First Bank),

Plaintiff,

v.

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York branch thereof; JOHN T. KEAN, individually and as an Officer and Manager thereof; MARINE MIDLAND BANK, N.A. (formerly Marine Midland Bank-Western),

Defendants-Appellees,

ARNOLD WEISS, ESQUIRE,

Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

UPON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. Appellant Arnold Weiss appeals from a decision of the United States District Court for the Western District of New York, *Greater Buffalo Press v. Federal Reserve Bank,* 129 F.R.D. 462 (W.D.N.Y. 1990), entered January 26, 1990. Weiss was the attorney for Greater Buffalo

Press, Inc. ("GBP"). Weiss appeals from the denial of his motions to recuse the trial judge, John T. Curtin, *Judge*, and to disqualify counsel for the Federal Reserve Bank of New York ("Fed NY"). Weiss also appeals sanctions that the district court imposed upon Weiss personally pursuant to Fed. R. Civ. P. 11 and 37.

2. On December 31, 1980, the district court ordered GBP to pay the attorney's fees Fed NY incurred in making its third rule 37 motion to compel discovery. Accordingly, Fed NY filed a fee application. GBP did not respond to the fee application, so Fed NY submitted a form order to the court imposing fees. The court did not sign the order submitted by Fed NY; rather, on August 17, 1981, the district court issued an order deferring its "ruling on the appropriate award for counsel fees until the end of the litigation." GBP submitted an "affidavit and aplication for disqualification" seeking Judge Curtin's recusal on or about December 3, 1981. On April 1, 1986 a member of Weiss' firm, Ralph C. Halpern, left that firm to join the firm then representing Fed NY in this litigation, Jaeckle, Fleischmann & Mugel. On March 17, 1988 the District Court granted Fed NY's motion for summary judgment. This court affirmed that decision in *Greater Buffalo Press v. Federal Reserve Bank*, 866 F.2d 38 (2d Cir.), *cert. denied*, 109 S.Ct. 3159 (1989). While the appeal was pending, Buffalo Press filed an affidavit on June 29, 1988 which, *inter alia*, "cross-move[d] the Court to disqualify itself herein by reason of long-standing and present personal bias and prejudice against plaintiffs' counsel." The district court denied the motion as "without merit."

3. Thereafter, Judge Curtin gave GBP one last opportunity to respond to Fed NY's rule 37 fee request. Instead, GBP again moved to recuse Judge Curtin,

summarily incorporating by reference in the supporting affidavit numerous files from other cases. The application was denied "on the present record," and GBP directed to incorporate specifically any files from other cases allegedly supporting recusal. Subsequently, on September 29, 1989, GBP filed its final motion to recuse Judge Curtin, as well as a motion to disqualify Jaeckle, Fleischmann & Mugel. Fed NY opposed those motions, and moved for rule 11 sanctions on the basis that the recusal motion was frivolous and interposed to harass and delay. The district court's January 26, 1990 decision denied GBP's motion to recuse, and granted Fed NY's motion for rule 11 sanctions in the amount of $3,360. That decision also required Weiss, personally, to pay rule 37 sanctions in the amount of $12,705.15. *See* 129 F.R.D. at 467-68. The motion to disqualify Jaeckle, Fleischmann & Mogel was denied.

4. Weiss argues that there was an appearance of partiality because of Judge Curtin's alleged bias against him, and that recusal was therefore required. In *Markel v. Scovill Mfg. Co.*, 657 F. Supp. 1102 (W.D.N.Y. 1987), *vacated mem.*, 859 F.2d 148 (2d Cir. 1988), Judge Curtin considered recusing himself because one of his daughters had worked part-time for a brief period at a flower shop owned by (Weiss' client) Markel, and three of Judge Curtin's daughters bought flowers for their weddings at Markel's shop. In *Markel*, Judge Curtin decided not to recuse himself (and to impose rule 11 sanctions against Weiss), but after an appeal was taken, Judge Curtin reconsidered and recused himself. This court vacated Judge Curtin's decision and the case was transferred to Judge Richard J. Arcara. Judge Curtin's opinion in the present case denied the motion to recuse in part by incorporating his discussion of *Markel* in *Person v. General Motors Corp.*, 730 F. Supp. 516 (W.D.N.Y. 1990),

where another Weiss motion to recuse Judge Curtin was denied. In *Person*, Judge Curtin said that his recusal in *Markel* "was neither an acknowledgement of the legal sufficiency of [Weiss'] motion in that case, nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him." 730 F. Supp. at 519. While this statement does not specify why Judge Curtin recused himself in *Markel*, and whatever may have transpired between Weiss and Judge Curtin in the past, we do not believe that Judge Curtin erred in denying the motion to recuse in *this* case. We also do not believe that he abused his discretion in sanctioning Weiss on the occasion of his fourth recusal application in this case. *See Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2461 (1990) ("an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination.").

5. The test for judicial disqualification under the broadest recusal statute, 28 U.S.C. §455(a) (1988), is whether an "objective observer" with knowledge of all the circumstances might reasonably question Judge Curtin's impartiality. *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194, 2203 (1988). Bias against a lawyer is only a concern if it leads to bias against a party represented by the lawyer. This is not one of those "extreme cases in which the judge's attitude toward a party's attorney [is] so hostile that it would be reasonable to conclude that the judge [is] unable to remain impartial as to the client." *Panzardi-Alvarez v. United States*, 879 F.2d 975, 984 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 1140 (1990). We see no evidence of bias against GBP. In fact, the record reveals that Judge Curtin treated GBP fairly and exhibited extraordinary patience toward Weiss.

6. At oral argument, Weiss contended, analogizing to the rule in criminal contempt cases, that Judge Curtin should have referred the rule 11 motion (and perhaps the underlying motion for recusal, as well) to another judge, rather than decide it himself. We disagree. Such a procedure is mandated (absent a defendant's dispensing consent) by Fed. R. Crim. P. 42(b) as to criminal contempts not committed in the presence of the court, if "the contempt charge involves disrespect to or criticism of a judge." As the Supreme Court has made clear, however, such criminal contempt proceedings are essentially subject to the safeguards accorded in a normal criminal prosecution, *see Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2132-33 (1987), since the Court "has come to regard criminal contempt as 'a crime in the ordinary sense.' " *Id.* at 2133 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). We decline to extend such protections to cases involving less severe sanctions, such as the order in this case to pay $3,360 to an adversary's counsel for the time spent by that counsel in opposing a frivolous and repetitive recusal motion.

7. We do not believe that the district court erred in granting Fed NY's rule 37 motion. GBP failed to respond to Fed NY's interrogatories, and had already established a track record of refusing to cooperate with the discovery process. Given GBP's history of violating the discovery rules, additional warnings from the bench would have been redundant and sanctions were appropriate. Nor, under the circumstances, was it erroneous ultimately to impose the sanction upon Weiss rather than the class of plaintiffs that he represented.

8. The motion to disqualify Jaeckle, Fleischmann & Mugel was properly denied in view of the district court's finding that Halpern "has not participated in any way in this litigation." 129 F.R.D. at 465. *See In re Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 254 (2d Cir. 1985) (citing *Armstrong v. McAlpin*, 625 F.2d 433, 442-46 (2d Cir. 1980) (in banc), *vacated and remanded on other grounds*, 449 U.S. 1106 (1981)).

J. DANIEL MAHONEY

JOHN M. WALKER, JR.

JOHN S. MARTIN, JR.

N.B.: This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in related cases before this or any other court.

APPENDIX C

Order and Judgment of the United States District Court for the Western District of New York, per Curtin, J., dated January 26, 1990 (129 FRD 462) denying recusal and imposing Rule 11 sanctions

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., etc.,
Plaintiff,

vs.

FEDERAL RESERVE BANK OF NEW YORK, etc., et al.,
Defendants.

APPEARANCES:

RAICHLE, BANNING, WEISS & STEPHENS (ARNOLD WEISS, ESQ., of Counsel), Buffalo, New York, for Plaintiff.

FEDERAL RESERVE BANK OF NEW YORK (ERNEST T. PATRIKIS, ESQ., General Counsel; THOMAS C. BAXTER, JR., ESQ., Associate General Counsel, and STEVEN T. SMITH, ESQ., of Counsel), New York, New York, for Defendants.

On March 17, 1988, this court granted defendants' motion for summary judgment and dismissed plaintiffs' fourth complaint (Items 132, 133). That decision was

affirmed on January 18, 1989, *Greater Buffalo Press, Inc. v. Federal Reserve Bank of New York*, 866 F.2d 38 (2d Cir.), *cert. denied*, 109 S.Ct. 3159 (1989). There still remains for decision a determination of the monetary amount of a Rule 37 sanction against plaintiff because of an order entered on December 31, 1980 (Item 51). The court held that sanctions should be awarded but did not determine the amount at that time for reasons that will be set forth in this decision. However, before that motion may be considered, the court must first rule on plaintiff's motion for recusal.

Plaintiff has filed three motions for recusal. The first, filed on June 30, 1988, was appended to plaintiff's response to the defendants' motion for sanctions and its cross-motion for sanctions against the defendants (Item 140 at ¶3). The second was filed on July 26, 1989 (Item 150), but was denied without prejudice to renew on proper papers (Item 152). A third motion to recuse was filed on September 29, 1989 (Item 155). In addition to the recusal motion, plaintiff also seeks disqualification of defendants' counsel. Defendants have replied by memoranda and affidavit, and have moved for Rule 11 sanctions (Items 157-60, 162). The court will take up the recusal motion first.

Motion for Recusal

Contemporaneously with filing a decision in this case, I have filed a decision in the case of *Person v. General Motors Corporation*, CIV-89-737C. In that case, plaintiff's counsel, Arnold Weiss, Esq., also moved for my recusal and made many of the same arguments that he set forth in this case. The detailed analysis of the law made in that decision applies to his application for a recusal in this case as well.

The court has carefully reviewed the authorities bearing on the question of recusal, especially the recent teaching of the Second Circuit in cases such as *In re Drexel Burnham Lambert, Inc*, 861 F.2d 1307, 1314 (2d Cir. 1988), *reh'g denied*, 869 F.2d 116 (2d Cir.), *cert. denied*, 109 S.Ct. 2458 (1989); *Apple v. Jewish Hospital and Medical Center*, 829 F.2d 326 (2d Cir. 1987); and *In re International Business Machines Corp.*, 618 F.2d 923 (2d Cir. 1980). The court must first determine whether the procedural requirements under the statutes have been met. In this case, it is clear that they have not been met. Furthermore, it is clear that adverse rulings by the court in this case or in other cases do not create the appearance of bias. In order to mandate recusal, bias must be personal and cannot rest upon trial rulings or conduct. The recusal statutes, *see* 28 U.S.C. §§144, 455(a), and 455(b)(1), were never intended to enable a litigant to oust a judge for adverse rulings. "A judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re Drexel Burnham Lambert, Inc.*, 861 F.2d at 1312.

The affidavit filed by plaintiff's counsel in support of the motion is clearly insufficient. Counsel alleges that I am biased against him but does not allege that I am biased against his client. The affidavit is rife with opinions, conclusions, and surmise, but is wanting in factual detail. Some of the events referred to occurred some time ago, and others have no bearing whatsoever on the present case.

Defendants have set forth a partial list of deficiencies:

(a) A *party* must file an affidavit alleging bias; an attorney's affidavit is not competent;

(b) The Weiss Affidavit alleges no bias or prejudice directed against a party or in favor of another party;

(c) A party is limited to "one . . . affidavit in any case," under 28 U.S.C. §144, yet Mr. Weiss has sought recusal three times in this matter;

(d) The Weiss Affidavit lacks a certification that it is made in good faith;

(e) The Weiss Affidavit is untimely;

(f) The Weiss Affidavit contains matter immaterial to the Motion to Recuse;

(g) The Weiss Affidavit contains scandalous, impertinent and redundant matter; and

(h) The Weiss Affidavit contains no matter relevant to the Motion to Recuse.

Item 157 at 2 (emphasis supplied). Furthermore, in their memorandum (Item 158), defendants have discussed at length the many inadequacies of Mr. Weiss's application and have supported each point with substantial authority. Defendants have characterized it as "an encyclopedia of bald and unsupported assertions." Item 158 at 16. Many of his assertions are frivolous. Simply to list them will reveal their inadequacies:

> Mr. Raichle's characterization of Mr. Weiss' work product as "excellent job" (¶4).
>
> The accusation that the Court has a "long-standing bias" toward Mr. Weiss (¶6).
>
> The accusation that the award of attorneys' fees was "unjust" (¶25).
>
> The allegation that the bias of the Court "intensified" (¶27).
>
> The detection of supposed bias from "grimaces and hostile responses" (¶28).
>
> The speculative and hypothetical "embarrassment" that the Court will endure as a result of the foregoing accusations and allegations (¶29).

Item 158 at 16.

Some of the allegations are threatening in nature, and clearly have no place in an application for recusal. Mr. Weiss asserts that I have had a longstanding bias against him "because of deponent's actions in bringing to light certain conduct of Judge Curtin which constitutes a marked departure on his papt [sic] from accepted standards of Judicial Conduct." (Item 155 at ¶6). There is no mention of either what the conduct was or what he supposedly brought to light. Apparently, it was his intention to seek censure of this court for rulings made in the case of *Markel, et al. v. Scovill Manufacturing Company, et al.*, CIV-78-269 (Item 155 at ¶¶7-8), before the case was transferred to Judge Richard Arcara. He charges that I made false statements in an opinion in that case (§18-19), and that I altered the record in another case (§§10-13). Such charges may be appropriate for a record on appeal or form the basis of a complaint to the Judicial Council, but they do not support a recusal motion. Although this affidavit for recusal was filed in September of 1989, I am unaware of any action taken by Mr. Weiss concerning a complaint to the Judicial Council since that time. If he desires to complain to the Judicial Counsel, he should do so promptly. In any event, his accusations are utterly false, and provide no basis for recusal.

As for my actions in the case of *Ada Mae Dowell v. General Motors Corporation*, CIV-78-840 (Item 155 at ¶¶10-13), the events there occurred more than ten years ago, and if they were the basis for any motion to recuse, such a motion should have been brought long ago. Mr. Weiss's assertion that I "altered the date of filing on the document" is made without any factual support and is completely untrue. My recollection is that Ms. Dowell's papers were sent to the Clerk's Office in a timely fashion but, inadvertently, were not filed. I recall that I allowed

back-dating so that the *pro se* complaint could proceed. This filing occurred at a time before this district had a *Pro Se* Law Clerk, and the Clerk's Office was inundated with many *pro se* petitions.

I will resist the temptation to comment at length upon a number of the allegations made by Mr. Weiss. Suffice it to say that he places emphasis upon particular events out of context while omitting other relevant material. Some facts are twisted, and other assertions are completely inaccurate. It is incorrect for him to say, for example, that I recused myself in *Hudson v. General Motors,* CIV-88-250 (Item 155 at ¶30). That case, along with many others, as transferred to Judge Arcara shortly after he came to the court to relieve my docket and to build up his.

Through the years, I have handled many cases in which Mr. Weiss represented various clients. I continue to serve in cases in which he is involved, and as recently as a few weeks ago I heard argument from him in a case pending before me. A review of the record would indicate that Mr. Weiss was successful in many of the cases urged before me—not because there was any bias on the part of the court for or against him, but simply because the facts and the law were on his side.

The history of this case shows that extensions of time were given frequently to Mr. Weiss, that on several occasions he was permitted to file motions for reconsideration, and that I permitted the discovery deadline to be extended again and again so that settlement discussions could go forward. The record thus reveals that although in this case and in others I have criticized Mr. Weiss for delays and for filing unnecessary, prolix, and repetitious motions, I have

nonetheless made every effort to give him and his client their day in court. Frankly, it is the opposing parties who have suffered by having to withstand barrages of these unnecessary and often delaying tactics. The filing of a recusal motion in this case is a clear illustration of such behavior. Mr. Weiss's motion is disturbing and disruptive, and has taken a good deal of time to decide because of the "shotgun" nature of his complaints, but it forms no basis for recusal and is, therefore, denied.

Motion for Disqualification

In addition to recusal, Mr. Weiss moves for disqualification of the firm of Jaeckle, Fleischmann & Mugel for the reason that Ralph Halpern, Esq., was formerly an associate of his in practice with Frank Raichle but joined the Jaeckle firm after Mr. Raichle's death. Therefore, he asserts, there is a conflict of interest that bars the Jaeckle firm from any participation in this action (Item 155 at ¶¶3, 5).

In response, counsel for the defendants states that there has been full disclosure of these facts to the Federal Reserve Bank and that the bank does not object to the continuation of the Jaeckle firm in this case. Furthermore, since joining the Jaeckle firm Mr. Halpern has not participated in any way in this litigation. The application for disqualification is thus denied. *Armstrong v. McAlpin,* 625 F.2d 433, 444-46 (2d Cir. 1980) (en banc), *vacated and remanded on other grounds,* 449 U.S. 1106 (1981); *Board of Education v. Nyquist,* 590 F.2d 1241 (2d Cir. 1979).

Rule 37 Sanctions

On December 31, 1980, I filed an extensive order (Item 51) discussing discovery up to that date and determining that, because of plaintiff's repeated violations of the discovery order, the application of defendants for attorney's fees against plaintiff would be granted. Defendants were directed to file an affidavit setting forth fees in detail. That affidavit was filed on March 6, 1981 (Item 52).

Several extensions were given to Mr. Weiss to file a response (Items 53, 56, 59). He eventually filed an untimely response on August 10, 1981 (Item 63). In his affidavit, however, Mr. Weiss did not question the amount requested by defendants' attorney or seek a hearing on the amount of fees to be awarded, but instead attempted to reargue the motion for sanctions that had already been decided.

In my order of August 17, 1981 (Item 64), I noted that "there is a strong argument that its contents should be disregarded in their entirety." I further held:

> Without question, the tactics of plaintiff have put upon the defendants a time-consuming burden in forcing plaintiff to answer interrogatories which should have been answered some time ago without necessity of a motion to compel. However, because there appears to be duplication in defendants' critique of plaintiff's answers, there ought to be a reduction in the amount requested.

Item 64 at 3.

Rather than divert the attention of the court and counsel from resolution of the merits of the case, I decided to put off ruling on the appropriate award for attorney's fees until the end of the litigation (Item 64 at 3-4). Eventually, defendants' motion for summary

judgment was granted, and on May 18, 1988, an order was issued giving plaintiffs until June 28, 1988, to file a response (Item 137).

In his response, Mr. Weiss once again failed to heed the court's direction. On June 28, 1988, instead of filing an affidavit challenging the amount of fees, Mr. Weiss filed what he characterized as "Plaintiffs' Response and Cross-Motion" (Item 140). He claimed lack of jurisdiction of the court to decide the fee request in view of the notice of appeal, and sought sanctions against defendants and their counsel and recusal of the court.

I met with counsel on July 1, 1988, and gave plaintiff until July 8, 1988, to file authority for his argument that the court lacked jurisdiction. I directed that another meeting be held on July 15, 1988 (Item 141).

After oral argument on July 15, 1988, an order was issued on July 19, 1988, denying all motions but again giving plaintiff an opportunity to file, not later than July 26, 1988, an affidavit challenging the amount of fees (Item 144). In his responding affidavit (Item 145), Mr. Weiss again argued the merits of the sanction ruling and attempted to urge a cross-motion for sanctions against the defendants. He also included, finally, an analysis of the details of the fee application (*id.* at 5-8).

In the interest of the efficient use of judicial time, I decided to hold the papers until after the Court of Appeals decided the appeal from the court's order granting summary judgment to defendants. After the Court of Appeals affirmed, counsel for defendants requested, in a letter dated February 24, 1989 (Item 146), that the court issue a decision on the amount of monetary sanctions to be imposed. I gave Mr. Weiss yet another opportunity to be imposed. I gave Mr Weiss yet

another opportunity to respond (Item 149). Instead of replying, however, he made another motion to recuse (Item 150).

The letter of July 26, 1989, submitted by defense counsel (Item 151) correctly sums up the frustration that this court and counsel have had to endure due to the conduct of plaintiff's counsel in this case. The court has had an opportunity to review the original filing of Mr. Troy in support of the affidavit for attorney's fees (Item 52) in light of the objections finally filed by Mr. Weiss (Item 145). As defense counsel notes, the first objection raised by plaintiff has already been barred by prior order of the court and is obviously without merit (Item 151 at 2).

In his second objection, Mr. Weiss claims that the defendants' motion for sanctions was "a verbose 140 page Affidavit" that sets forth a "'stream of consciousness' rather than any specific detailed objections." Item 145 at ¶16. As defense counsel notes, however, in my order of December 31, 1980, I analyzed in detail the objections made by the defendants and found that they were meritorious.

Finally, I have reviewed plaintiff's analysis of the statement of expenses and find it without merit.

The defendants are clearly entitled to the relief sought. The affidavit presented details of the hours expended and the services provided. The records were contemporaneous with the events described. Despite many opportunities to file specific objections to the fee application, plaintiff's counsel repeatedly failed to respond directly. After a complete review of the record, I have determined that, notwithstanding my comments in the order of August 17, 1981, to which I previously referred, the application for fees shall be granted in its

entirety in light of the failure of plaintiff's counsel to reply to the application in a timely manner and of the obstructive tactics to which he resorted in opposing the application.

Rule 11 Sanctions

Defendants have also moved for Rule 11 sanctions against Mr. Weiss for filing frivolous motions for recusal and for disqualification (Items 157-60, 162).

The standard for Rule 11 sanctions has been expressed by the Second Circuit as follows:

> [S]anctions shall be imposed against an attorney and/or his client when it appears that a pleading has been interposed for any improper purpose, *or where*, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Eastway Construction Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985) (emphasis supplied) (footnote omitted), *on remand*, 637 F.Supp. 558 (E.D.N.Y. 1986), *modified*, 821 F.2d 121 (2d Cir.), *cert. denied*, 484 U.S. 918 (1987).

I have reviewed in detail the application made by Mr. Weiss for recusal and for disqualification, and find them wholly without merit. No statutes or cases were cited in support of his position. Furthermore, as I have previously noted, a good part of the affidavits are immaterial, speculative, and threatening. I find that no reasonable attorney, especially a lawyer with Mr. Weiss's experience, could come to the conclusion that the court was biased against either him or his client. I further find that the true purpose of filing the motions was to delay and to harass.

Defendants' attorney has filed an affidavit in support of Rule 11 sanctions (Item 159) and seeks an award of $3,360.00. In *Eastway*, the Second Circuit directed that the amount of fees to be awarded should be "only that portion of a defendant's attorney's fee thought reasonable to serve the sanctioning purpose of the Rule." 821 F.2d at 123. I find that the amount sought by defense counsel is reasonable, and believe that an award in that amount would unquestionably be reasonable to serve the sanctioning purpose of Rule 11.

Mr. Weiss has failed to respond to the motion for Rule 11 sanctions, which was filed three months ago. In light of the history of this case, particularly the manner in which Mr. Weiss has ignored the orders of the court by submitting unresponsive and, at times, frivolous responses, he shall not be given any further opportunity to respond. The defendants thus shall be awarded the full amount requested.

Although I indicated in my order of August 17, 1981, that the Rule 37 sanctions would not be imposed on Mr. Weiss personally (Item 64 at n.1), it is apparent that he interpreted that as a license to continue submitting unresponsive and otherwise improper filings and to delay this case unnecessarily. In light of similar actions by Mr. Weiss in other cases, I have no reason to believe that his client here encouraged or sanctioned this conduct. Fairness thus dictates that Mr. Weiss's client should not bear the brunt of any of the sanctions imposed herein, particularly in light of the fact that Mr. Weiss's papers contained accusations based on alleged actions or events in other cases involving Mr. Weiss but not involving this client. The court has no reason to believe that the plaintiff in this case had any knowledge of those cases independent of information supplied by Mr. Weiss. In

addition, the court believes that imposing the sanctions against Mr. Weiss's firm would not sufficiently deter Mr. Weiss in the future from engaging in the type of conduct that has resulted in the imposition of sanctions in this case. Consequently, payment of both Rule 37 sanctions and Rule 11 sanctions shall be borne by Mr. Weiss personally rather than by the plaintiff or by the law firm of Raichle, Banning, Weiss, & Stephens. *Pavelic & LeFlore v. Marvel Entertainment Group,* 110 S.Ct. 456 (1989). I do not take this action because I consider Mr Weiss's conduct a personal affront. Rather, I do so because I have a duty to uphold the dignity of this court, and to take those actions necessary to make clear that conduct such as that displayed by Mr. Weiss in this case, which serves only to obstruct the just and efficient adjudication of cases, will neither be condoned nor ignored.

In sum, the plaintiff's motions for recusal and for disqualification of the firm of Jaeckle, Fleischmann & Mugel are denied. The application of the Federal Reserve Bank and John T. Kean for attorney's fees in the sum of $12,705.15 is granted. The defendants' motion for Rule 11 sanctions in the amount of $3,360.00 is also granted. The plaintiff's cross-motion for sanctions against the defendants is denied.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: January 26, 1990

APPENDIX D

Order of the United States District Court for the Western District of New York, per Curtin, J., dated June 8, 1990 (unreported), denying motion to supplement Record on Appeal from order of January 26, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., etc.,
Plaintiff,

vs.

FEDERAL RESERVE BANK OF NEW YORK, etc., et al.,
Defendants.

The motion by Mr. Weiss "To Supplement Designation of Record on Appeal" (Item 174) is hereby denied.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: June 8, 1990

APPENDIX E

Order of the United States District Court for the Western District of New York, per Curtin, J., dated March 6, 1990 (unreported), denying motion to amend order of January 26, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., etc.,
Plaintiff,

vs.

FEDERAL RESERVE BANK OF NEW YORK, etc., et al.,
Defendants.

By a motion filed February 5, 1990 (Item 164), plaintiffs' counsel seeks to amend the court's order of January 26, 1990, and to supplement the record, citing Federal Rules of Civil Procedure 52(b) and 60(a), and Federal Rule of Appellate Procedure 10(e). Upon learning that plaintiffs' counsel had neither filed nor supplied to opposing counsel a so-called "binder" to which he had referred in his affidavit, the court ordered him to do so forthwith (Items 165, 166). Plaintiffs' counsel then submitted what he referred to as "Supplemental Binder A" (Item 167) and "Supplemental Binder B" (Item 168). The defendants subsequently filed a memorandum of law in opposition to the motion on March 5, 1990 (Item 169).

The court finds no basis to amend its findings pursuant to Rule 52(b), no clerical mistakes that should

be corrected pursuant to Rule 60(a), and no basis to correct or to modify the record pursuant to Rule 10(e). It is apparent that plaintiffs' counsel is attempting to correct deficiencies in his motions for recusal rather than in either the court's order or the record.

The motion is denied in all respects.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: March 6, 1990

APPENDIX F

Order of the United States District Court for the Western District of New York, per Curtin, J., dated February 15, 1990 (unreported), directing filing of material incorporated by reference on recusal motion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., etc.,
Plaintiff,

vs.

FEDERAL RESERVE BANK OF NEW YORK, etc., et al.,
Defendants.

On February 5, 1990, plaintiff filed a motion to amend the order of the court filed on January 26, 1990. As reflected in the letter of Ronald A. Huebsch, Esq., one of the attorneys for the defendants, Mr. Huebsch requests time to submit answering papers in opposition to plaintiff's motion, but he notes that the so-called "binder" referred to in paragraph 21 of Mr. Weiss's affidavit was not received and had not been filed with the court. As of the morning of February 14, 1990, the Clerk's Office informed the court that no "binder" has been filed.

If Mr. Weiss desires to have the binder considered as part of the record, these materials shall be filed with the court forthwith but no later than February 20, 1990, and delivery made to Mr. Huebsch's office not later than that day.

The time for defendants to reply to plaintiff's motion shall be extended until March 5, 1990, whether or not the binder is filed. The court will consider the motion submitted at that time.

So ordered.

JOHN T. CURTIN
United States District Judge

APPENDIX G

Order and Opinion of the United States District Court for the Western District of New York, per Curtin, J., dated August 3, 1989 (unreported), refusing to consider material incorporated by reference on recusal motion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-27C

GREATER BUFFALO PRESS, INC., etc.,
Plaintiff,

vs.

FEDERAL RESERVE BANK OF NEW YORK, etc., et al.,
Defendants.

The application for recusal filed by plaintiff's attorney on July 26, 1989, is denied on the present record with opportunity to renew with a more detailed and complete statement.

In the application, the applicant refers to affidavit filed in the case of *Person v. General Motors Corp.*, CIV-89-737, W.D.N.Y., and also all of the pleadings and proceedings in *Markel v. Scovill*, CIV-78-269A.

If the application desires to have these matters made part of the record in this case, that should be done specifically so that the specific reason for recusal may be set forth in one file.

The court declines to search the record in the *Person* and *Markel* cases in order to determine what parts of the proceedings in those cases have application to this.

The application on the present record is denied.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: August 3, 1989

APPENDIX H

Order and Opinion of the United States District Court for the Western District of New York, per Curtin, J., dated October 31, 1988 in *Markel v. Scovill,* (CA 2 Docket No. 88-7221 et seq.—unreported), after reconsideration granting motion for recusal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-269C

FANNYE MARKEL, et al.,

Plaintiffs,

vs.

SCOVILL MANUFACTURING COMPANY, et al.,

Defendants.

In this case, shortly after a motion for summary judgment was filed, the plaintiffs sought my recusal from the case. That application was denied, the motion for summary judgment was granted, and further proceedings were taken in this case.

After an appeal was taken, the court had an opportunity to review the briefs which were filed on the appeal and sent a note to the Court of Appeals seeking a return of the file so that I could reconsider the issue of recusal. The mandate of the Court of Appeals was issued and filed with the District Court on September 28, 1988, and made an order of this court on October 3, 1988. Shortly thereafter, the original papers were also returned from the Court of Appeals.

After reconsideration, the motion for recusal is granted. The Clerk of the Court is directed to transfer this file to any one of the other Judges of the District.

So ordered.

JOHN T. CURTIN
United States District Judge

Dated: October 31, 1988

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DATE: November 1, 1988

RE: FANNYE MARKEL, et al., -v- SCOVILL MANUFACTURING COR., etc. et al.

CIVIL: 78-269C

The above case is to be transferred from JUDGE CURTIN to JUDGE ARCARA.

JOHN T. CURTIN
United States District Judge

DOCKET CLERK:

Reassign case as indicated above.

APPENDIX I

Order and Mandate of the United States Court of Appeals for the Second Circuit, filed August 29, 1988 in *Markel v. Scovill,* (CA 2 Docket No. 88-7221 et seq.—859 F2d 148), vacating judgment and remanding for reconsideration of motion for recusal

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CURTIN

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

MANDATE

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
AUG 29 1988
ELAINE B. GOLDSMITH, CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of August, one thousand nine hundred and eighty-eight.

Present:

HONORABLE JON O. NEWMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges,

88-7221,
88-7223,
88-7225.

FANNYE MARKEL, et al.

v.

SCOVILL MANUFACTURING COMPANY, et al.

The record having been supplemented by a statement of the District Court, indicating an intention to reconsider the issue of recusal in the event of a remand, it is hereby ORDERED that the judgment is vacated and the cause remanded to the District Court to afford the District Court an opportunity to reconsider the issue of recusal.

JON O. NEWMAN
AMALYA L. KEARSE
RICHARD J. CARDAMONE
Circuit Judges

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

A TRUE COPY
ELAINE B. GOLDSMITH
Clerk

APPENDIX J

Order of the United States District Court for the Western District of New York, per Curtin, J., dated August 4, 1988 in *Markel v. Scovill,* (CA 2, Docket No. 88-7221, et seq.—unreported), requesting return of mandate for reconsideration of order denying recusal motion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-269C

FANNYE MARKEL, individually, et al.,
Plaintiffs,

-vs-

SCOVILL MANUFACTURING COMPANY,
a corporation, et al.,
Defendants.

This case is now pending in the United States Court of Appeals for the Second Circuit under appellate court docket numbers 88-7221, 88-7223 and 88-7225.

Having read the appellate papers filed by the parties in this matter, the court has concluded that it is appropriate to reconsider the issue of recusal and would do so if the case were remanded. The Clerk is directed to send a copy of this statement to the Court of Appeals.

JOHN T. CURTIN
United States District Judge

Dated: August 4, 1988

APPENDIX K

Constitutional Provisions, Statutes and Rules Involved

United States Constitution
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, United States Code:

§455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the

amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a resonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 37. Failure to Make or Cooperate in Discovery: Sanctions

* * *

(b) Failure to Comply with Order.

* * *

(2) ***Sanctions by Court in Which Action is Pending.*** If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

* * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * *

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

Rule 10. The Record on Appeal

(a) **Composition of the Record on Appeal.** The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

* * *

(e) **Correction or Modification of the Record.** If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

APPENDIX L

Portions of Suppressed Recusal Binder B United States District Court Docket Item No. 168 (from Markel Joint Appendix—Court of Appeals Docket No. 88-7221, 7223 and 7225)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CIV-78-269C

FANNYE MARKEL, individually and in the name and on behalf of MARKEL ELECTRIC PRODUCTS, INC., and all other similarly situated shareholders thereof; and MARKEL HEATER CORPORATION.

Plaintiffs,

vs.

SCOVILL MANUFACTURING COMPANY, a corporation; MARKEL ELECTRIC PRODUCTS, INC., a corporation; DAVID MARKEL; LESTER M. MARKEL; ROBERT H. JACOBSON; F. E. WARNER; WALTER R. BUSH; JOHN WASHBURN; JAMES RANKIN; LEONARD F. LEGANZA; JOHN DOE; and RICHARD ROE, being co-conspirators whose identity is presently unknown,

Defendants.

AFFIDAVIT OF FANNYE MARKEL IN SUPPORT OF PLAINTIFFS' MOTION FOR FRECONSIDERATION OF DECISION ON RECUSAL

FANNYE MARKEL, being duly sworn, deposes and says:

1. I have personal knowledge of the facts set forth in this Affidavit, and if called as a witness could and would competently testify thereto.

2. I am lead plaintiff herein, suing on behalf of myself, and all other similarly situated persons, as a shareholder of Markel Electric Products, Inc., as well as the President of plaintiff Markel Heater Corporation.

3. I make this Affidavit in support of plaintiffs' motion for reconsideration of the Court's decision on recusal so that the record in this case will contain a full disclosure of all of the grounds for the disqualification of Judge Curtin.

4. I am the President and owner of "The Floristry", a flower shop located at 1385 Delaware Avenue, Buffalo, New York 14209, and at the Hyatt Regency Hotel in downtown Buffalo. I have owned and operated The Floristry at these and other locations for approximately the past 20 years.

EILEEN'S EMPLOYMENT

5. In June, 1981, at the time of the first request for handling a wedding for one of Judge and Mrs. Curtin's daughters, Mrs. Curtin spoke to me in the Floristry on Delaware Avenue about employing their daughter Eileen. She asked if I could hire Eileen. She said they were concerned about Eileen because she was withdrawn and preferred to remain at home, doing things such as "caning chairs."

6. Mrs. Curtin said that Judge Curtin and she would consider it a personal favor if I would give Eileen a job to help her become more outgoing. I did not need any

additional help at that time, and Eileen was inexperienced in our type of work, but I told Mrs. Curtin to send her in, and I would hire her for the Summer.

7. Eileen started working for me in the last week of June, 1981, after the first Curtin wedding on June 20th. I personally made many attempts to teach Eileen the business, but she did not seem to be interested in learning our work. Eileen was quiet, and seemed to be unhappy. Other employees at The Floristry remarked to me about her withdrawn attitude, and that she seemed unhappy and resentful at being at the shop.

8. As our wedding season wound down, I had to cut expenses. I wanted to lay Eileen off, but was concerned about doing so because Judge Curtin was presiding over my case. However, I did gradually cut back on her hours. Many days, I asked one of my secretaries to call Eileen at home and ask her not to come in for that day. Eileen continued working, on a gradually reduced schedule, until the end of October, 1981.

9. Mrs. Curtin again asked me to employ Eileen in 1982. Eileen worked at The Floristry during most of July and August of 1982. Her attitude was the same as it had been in the previous year.

10. I know that Judge Curtin was aware of Eileen's employment at the time. Eileen would mention that her father sometimes dropped her off on his way downtown. On occasions when it was raining, I offered to take her home. At times, however, she refused my offer of a ride, and said that her father was picking her up. On occasion, Judge Curtin came into The Floristry to pick up Eileen.

JUDGE CURTIN'S OPINION IS MISTAKEN

11. Judge Curtin's opinion, dated April 7, 1987, at page 9, states that I met with him, Mr. Weiss and Mr. Moot "to discuss this issue (recusal), and it was agreed by all that there was no basis for recusal."

12. Judge Curtin is mistaken. The only meeting I attended was one in the summer of 1984. I had requested my attorney, Mr. Weiss, to ask Judge Curtin to set up an "In-Chambers" meeting with Mr. Moot, Mr. Weiss and myself, in an attempt to settle this case. There never was a discussion in this 1984 meeting in which "it was agreed by all that there was no basis for recusal," as stated at page 9 of Judge Curtin's opinion, dated April 7, 1987. I never attended any other meeting with Judge Curtin, Mr. Moot and Mr. Weiss.

13. The subject of recusal at the summer of 1984 meeting would not have been raised for the following reasons:

A. Two months before that meeting, on April 6, 1984, and again on June 8, 1984, the Court ordered that the federal lawsuit be held in abeyance pending the outcome of the state court appraisal case, which the Court and we had hoped would resolve all or most of the issues at the state and federal level. The purpose of the summer of 1984 meeting was also to discuss a possible settlement, the subject of recusal at this meeting would have been irrelevant and inappropriate under these circumstances.

B. The Court in its April 7, 1987 Decision did not address the subject of the financial consideration requested and received by the Curtins on the occasion of the first wedding on June 20, 1981 (of one of their daughters). Had Eileen's employment been discussed as

Judge Curtin stated in his Decision, I would have also raised the subject of the financial consideration at the same meeting in the summer of 1984. We did not have any such discussion.

C. If the subject of Eileen's employment had been discussed, as Judge Curtin mistakenly stated in his April 7, 1987 Decision, I would have made it clear that the first period of Eileen's employment was 4 1/2 months, from June through October, 1981, and the second period was July and August in 1982, for which she was compensated in the amount of $1,768.72. Our Accountant's statement of Eileen's employment is attached hereto as Exhibit O.

D. If the subject of recusal had been raised, and the right of recusal had been waived, at the June, 1984 meeting, Mr. Moot's letter of November 25, 1985, which is attached hereto as Exhibit D, and which addressed the subject of recusal, would have stated that fact.

E. If the subject of recusal had been forever closed in this lawsuit and "all had agreed that there was no basis for recusal" at the summer of 1984 meeting, Judge Curtin would not have requested my "final word on the (recusal) problem" in his February 11, 1986 letter. Judge Curtin's letter dated February 11, 1986 is attached hereto as Exhibit A.

THE SETTLEMENT NEGOTIATIONS

14. The summer of 1984 meeting was an attempt to settle the case, rather than a discussion of recusal. The negotiations had gone so far toward a settlement at our meeting with Judge Curtin that the Court's Docket noted that a settlement was to be placed on the record on May 31, 1984. A recusal discussion would be irrelevant, and out of place, at such a meeting.

15. The settlement did not go through, as noted in Judge Curtin's Order of June 8, 1984. Judge Curtin again, as he had in his April 6th, 1984 Order, directed the parties to proceed first with the State Court case. Here again, any discussion of recusal of Judge Curtin would be irrelevant, and out of place, as the State Court Appraisal case, it was hoped, would resolve all or most aspects of this lawsuit.

16. There were State Court settlement meetings with State Supreme Court Justice James B. Kane at the end of 1985 and early in 1986. I did not attend these meetings. However, Mr. Weiss informed me, and it appears from the correspondence, that Justice Kane was able to negotiate a settlement of both the State and Federal Court actions to which both Mr. Moot and Mr. Weiss agreed. Mr. Weiss wrote to Justice Kane and Judge Curtin on November 25, 1986 that I had approved the settlement, and that Mr. Moot said that he would recommend the settlement to his client, Scovill. Those letters are attached hereto as Exhibit B.

17. Scovill later rejected Mr. Moot's recommendation, and refused to settle. Mr. Moot thereupon wrote to Judge Curtin on February 5, 1986 informing him that there was no settlement. That letter is attached hereto as Exhibit F. Appropos of Mr. Moot's letter of February 5, 1986, Judge Curtin wrote to Mr. Weiss on February 11, 1986, which letter is attached hereto as Exhibit G, and stated as follows:

> "I would appreciate it very much if you would send to me your final word on this problem. In your view should I recuse myself or not. I would appreciate your definite answer at least by the 4th of March."

Mr. Weiss responded on February 28th, 1986 and requested recusal, and confirmed this again in his March 17, 1986 letter. Those letters are attached hereto as Exhibits H and I. This sequence of correspondence indicates that there had *not* been *any agreement* among the parties that "there is no basis for recusal".

THE WEDDINGS OF THE CURTINS' THREE DAUGHTERS

18. The Floristry provided the flowers and decorations for the weddings of three of the Curtins' daughters. On each occasion, Mrs. Curtin asked me for special financial consideration. She asked me to make it beautiful, but to keep the cost down, and that she would appreciate whatever I could do. During one of the discussions, Mrs. Curtin mentioned how difficult it was for them with the children in private school, college, etc., since "judges do not earn a lot of money."

19. The first wedding was on June 20, 1981. I reduced the price of the flowers and decorations from the normal price of $488.50, ro $297.00, and then I gave the Curtins a 50% discount on this reduced price, so that they paid only $148.50 for a $488.50 wedding. Worksheet and bill for the first wedding attached hereto as Exhibit K.

20. The Floristry also provided the flowers and decorations for the second Curtin wedding. On September 29, 1984. Mrs. Curtin again asked me to keep the cost down as before, and said: "I know that you'll do right by Eileen." I charged the Curtins $270.75, plus the Groom's charges of 98.25, or a total of $369.00, for this second wedding. I am looking for the itemized worksheets to determine the exact dollar amount

reduction in price granted for this second wedding. At this time I have located the bill, but not the itemized worksheet.

21. I did not press my attorney for Judge Curtin's recusal during this period, since the federal case was quiescent, as shown by the lack of activity on the Court Docket. I continued to hope that there would be a settlement. Mr. Moot's letter of November 27, 1985 attached hereto as Exhibit E, confirms that "the settlement process has been a matter of years". I continued to hope that the state case would make the federal lawsuit academic. Judge Curtin's Orders of April 6th, June 8th, and September 24th, 1984, requested that everything be held in abeyance, pending the outcome of the state court appraisal case, in the hope that it would resolve of all or most of the issues.

22. In the latter part of November, 1985, Mrs. Curtin asked me to reserve the date of March 1, 1986 for the wedding of the third Curtin daughter. She said that I had done such a beautiful job on the previous weddings, and alluded to how well I had treated them, and how fair I had been on the price. Mrs. Curtin said this was going to be a fairly large affair.

23. After this November, 1985 request by Mrs. Curtin for the third wedding, I became concerned about handling the wedding and granting special financial considerations, as the lawsuit had become active again. Even while Mr. Moot was talking settlement in the state court case, he was pressing Judge Curtin by his letter dated November 25, 1985, attached hereto as Exhibit C, to decide his Motion to Dismiss.

24. Because of this concern, I asked Mr. Weiss to request that Judge Curtin recuse himself in this case. Mr. Weiss wrote to Judge Curtin on November 21st

requesting recusal stating that I would be happy to do the third wedding with special financial consideration, but the Judge should recuse himself. Mr. Weiss wrote to Judge Curtin again on November 26th, after Mr. Moot had responded to Mr. Weiss' November 21st letter and objected to recusal. Mr. Weiss' letters of November 21, and 26, 1985 to Judge Curtin requesting his recusal, are attached hereto as Exhibits A and D.

25. I assumed at the time, that in view of Mr. Weiss' letters, either Judge Curtin would recuse himself, or the Curtins would purchase flowers elsewhere for their third daughter's wedding.

26. When Mrs. Curtin told me in January, 1986, that she wished to confirm the wedding arrangement with The Floristry, I firmly believed that Judge Curtin, in view of all the correspondence that had occurred late in 1985, had decided to recuse himself from the case. I told my attorney, Mr. Weiss, of Mrs. Curtin's confirmation of the wedding plans, and asked his advice. Mr. Weiss responded that considering his letters to Judge Curtin, Mrs. Curtin's renewed request for the wedding meant that Judge Curtin was going to recuse himself, and that I could proceed with the wedding on that basis.

27. The settlement talks, which had developed in Judge Kane's Chambers, broke down, and on February 5, 1986 Mr. Moot wrote to Judge Curtin and so informed him. Since Judge Curtin realized that there was not to be a settlement, Judge Curtin wrote to Mr. Weiss on February 11, 1986 asking Mr. Weiss to respond by March 4, 1986 as to my "final word" on recusal. Mr. Weiss responded on February 28th and requested recusal, and offered to file a formal motion for that purpose if Judge Curtin wanted one. Mr. Moot's letter of February 5, 1986 is attached hereto as Exhibit F;

Judge Curtin's letter of February 11, 1986 is attached hereto as Exhibit G; and, Mr. Weiss' response of February 28th, 1986, is attached hereto as Exhibit H.

28. On March 11th (less than two weeks after the Curtin wedding) Mr. Moot responded to Mr. Weiss' February 28, 1986 "final word on the (recusal) problem" letter by filing a Declaration objecting to recusal, and renewing his motion for dismissal and sanctions. On March 17, 1986, Mr. Weiss sent a four-page letter to the Court responding to Mr. Moot's March 11, 1986 objections to recusal, and detailing the conditions under which Mrs. Markel had undertaken the floral decorations for the third Curtin wedding. Once again, Mr. Weiss in his March 17, 1986 letter offered to file a formal motion for recusal, stating as follows: "If after reviewing this letter, Your Honor is not disposed to a *sua sponte* recusal, we request that a motion schedule be set. We will file a motion and supporting affidavits. . .". Richard Moot's Declaration filed march 11, 1986 is Docket Item No. 149; and Arnold Weiss' letter dated March 17, 1986 is attached hereto as Exhibit I.

29. Mr. Weiss told me at that time that he would prefer to raise the matter of recusal privately and discreetly by letter to avoid embarrassment to the Court by providing the Court the opportunity for recusal without a formal motion.

30. Based on this assumption, that Judge Curtin understood the conditions under which I would do the third wedding, and believing he was abiding by my wishes for recusal as given by my "final word", I agreed to go forward with the third wedding. I personally delivered the wedding flowers to the Curtin home on March 1, 1986, the day of the wedding. Judge Curtin was present when I arrived. He showed me an Amaryllis

plant on his fireplace hearth, and asked my advice on how to preserve it after it was through blooming. I gave him my advice.

31. The Curtins also ordered flowers just before the wedding on February 27th, and several weeks after the wedding on March 28th, 1986 on which they received a special discount. They paid these bills, which ate attached hereto as part of Exhibit N, on April 9, 1986. This further confirmed my understanding that Judge Curtin had recused himself.

32. After the wedding, one of our Floristry staff told me that some of the glassware that we supplied for the reception table centerpieces at the Twentieth Century Club was missing. We called Mrs. Curtin about the missing glassware. She said they would try to locate it. The wedding billing was deferred, and the final wedding worksheet was put aside, pending return of the missing glassware. This was in accordance with Floristry policy, so that the customer does not unnecessarily bear an added cost.

33. Mrs. Curtin later came in twice, as I recall, with the missing items. After the missing items were returned, I could not find the final worksheet. The Staff and I looked for this missing final worksheet, which is essential to the billing of a wedding or party, but have not located it to this day.

34. As I recall, Mrs. Curtin called a couple of times asking about the bill. Mrs. Curtin sent a $200 "partial payment" check on August 15, 1986, attached hereto as Exhibit J. Our secretary returned the check, and Mrs. Curtin was told that we were continuing our search for the missing worksheet. Before I accepted any payment from the Curtins, I wanted to know what their bill was, so that I could properly discount it in total as I had done before.

35. Judge Curtin had my final word on recusal, and he had never asked us to make a formal motion for recusal as we requested. Judge Curtin was in receipt of Mr. Weiss' letters stating the conditions under which I would agree to do the third wedding with the requested financial considerations.

36. In March, 1987 when Mrs. Curtin came into the shop asking for the wedding billing, I believed that the recusal issue was settled, and Judge Curtin would no longer be deciding this case. Based on this (in March 1987) and my preoccupation with major remodeling and Easter preparations, I told Mrs. Curtin, I can't find the sheet, so "just forget it—give it to the kids for a wedding present". Mrs. Curtin said "No, I can't do that". I believed that she sincerely wanted to pay something for the wedding, so I told her that I would continue to look for the worksheet. That is the last time I heard from Mrs. Curtin.

37. When it became necessary to gather all of my records for this motion for reconsideration of recusal, I made a search for five days through years of records, boxes and folders from The Floristry's pre-computer days. I was able to find all of papers from the first wedding of June 20, 1981. Those first wedding papers are attached hereto as Exhibit K. The papers from the second wedding of September 19, 1984 are incomplete. I have the bill, but have not yet located the itemized worksheet. Those second wedding papers are attached hereto as Exhibit L. I have the preliminary worksheet and original list for the third wedding of March 1, 1986 but have not yet located the final worksheet. Those third wedding papers are attached hereto as Exhibit M.

38. During my search I found charges to the Curtins for 1980-86 on which I gave them discounts or price reductions when requested by Mrs. Curtin. Those charge slips are attached hereto as Exhibit N. I don't know if I have found all the charge slips.

39. Judge Curtin's opinion of April 7, 1987, shortly after Mrs. Curtin's visit to the shop, was a shock. I could not understand why Judge Curtin did not recuse himself in view of all the circumstances described above. If Judge Curtin was unwilling to recuse himself, I believe he should have patronized one of the many other flower shops in the Buffalo area, rather than creating a situation in which a reasonable person could question his impartiality.

FANNYE MARKEL

Sworn to and subscribed
before me this 30th day
of December, 1987

MARIE A. KAZMIERCZAK
Notary Public

MARIE A. KAZMIERCZAK
Notary Public, State of New York
Qualified in Erie County
My Commission Expirs May 4, 1989

Exhibit "A" Annexed to Affidavit of Markel.

RAICHLE, BANNING, WEISS & HALPERN

FRANK O. RAICHLE
DERRICK C. BANNING
ARNOLD WEISS
DAVID C. DIEFENDORF
RALPH L. HALPERN
R. WILLIAM STEPHENS
MATTHEW W. SULLIVAN

LAW OFFICES
1400 MAIN PLACE TOWER
BUFFALO, NEW YORK 14202
(716) 852-7597

November 21, 1985

Hon. John T. Curtin
United States District Judge
United States Courthouse
Buffalo, New York 14202

Re: Markel et al v. Scovill et al
Civ. No. 78-269-C

Dear Judge Curtin:

the flowers for your daughter's wedding next year. She is delighted at the opportunity and is looking forward with great pleasure to again serving your family.

This will be the third wedding she will be doing for your family, and she desires to again make it a beautiful affair at a very reasonable price, in view of your friendship and close relationship, which, of course, includes Eileen's employment.

Fann values your friendship and that of your family. She is concerned that in an effort to demonstrate impartiality in her lawsuit before Your Honor, you may unconsciously bend over backwards and favor the other side. The matter is further complicated by my own financial involvement with The Floristry, and Fann's and your close relationship with Alvin.

Fann is concerned that Scovill's motion to dismiss has been pending undecided before Your Honor for a long time. We recently noticed Fann's State Court Appraisal proceeding for immediate Trial by the Supreme Court. Scovill is now asking that the Appraisal hearing be held in abeyance pending Your Honor's decision on its motion.

Under the circumstances, and in everyone's interest, this appears to be an appropriate time for Your Honor to recuse himself from Fann's lawsuit.

Fan will call you personally on this, but wanted me to make this request formally.

Very truly yours,

Arnold Weiss

vg
cc: Richard Moot, Esq.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
624 U. S. COURT HOUSE
BUFFALO, NY 14202

CHAMBERS OF
JOHN T. CURTIN
CHIEF JUDGE

Exhibit "G" Annexed to Affidavit of Markel.

February 11, 1986

Arnold Weiss, Esq.
1400 Main Place Tower
Buffalo, N.Y. 14202

Re: Markel v. Scovill, CIV-78-269C

Dear Mr. Weiss:

I understand that the appraisal case is now proceeding in the state court. As you are aware, defendant's motion for dismissal and sanctions is still pending before me.

Before the first of the year you wrote to me and suggested that it may be best if I recuse myself from this litigation. After that, we had a meeting and, as I recall, you suggested that I do not take any action. Furthermore, there have been prior meetings in which the recusal problem was addressed and at these meetings it appeared to the court that there did not seem to be any reason why the court should be recused.

I would appreciate it very much if you would send to me your final word on this problem. In your view shall I recuse myself or not. I would appreciate your definite answer at least by the fourth of March.

Very truly yours,

JOHN T. CURTIN
United States District Judge

jr

cc: Richard E. Noot, Esq.

55a

Exhibit "H" Annexed to Affidavit of Markel.

RAICHLE, BANNING, WEISS & HALPERN

FRANK O. RAICHLE
DERRICK C. BANNING
ARNOLD WEISS
RALPH L. HALPERN
R. WILLIAM STEPHENS
MAUREEN W. SULLIVAN

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February 28, 1986

Hon. John T. Curtin
United States District Judge
United States Courthouse
Buffalo, New York 14202

Re: Markel et al v. Scovill et al. Civ. No. 78-269-C

Dear Judge Curtin:

Fann has written to me appropos of Your Honor's letter. In view of the circumstances which she reviews in her letter, she requests that Your Honor recuse himself.

She is pleased that you once again selected her for your daughter's wedding. She again intends to make it a beautiful affair, with the same considerations, in view of your mutual friendship and past relationship,

Supreme Court Justice Fudeman sua sponte recused himself last month from the State Court Appraisal Hearing when he learned who the parties were. He said: "I know Fann and Morris, I buy flowers there. I can't sit on the case." Fann explained in her letter that her relationship with Justice Fudeman was far more remote than her relationship with Your Honor and Your Honor's family.

Fann also wrote of her concern because of confidences conveyed to her by certain friends, who are mutually close friends of Your Honor. While she would prefer not to reveal these, they do cause definite concern in her mind as to my representation of her before Your Honor in this case.

We just completed the State Court Appraisal proceeding before Hon. Charles R. Newman, an out-of-Town Judge selected by Administrative Justice James B. Kane. We believe he intends to make a prompt Decision.

Accordingly, Fann requests that Your Honor recuse himself from her lawsuit. I assume that it will not be necessary to make a formal motion, since the facts are known to all of the parties, but will file one if Your Honor so desires.

Very truly yours,

Arnold Weiss

vg

cc: Richard E. Moot, Esq.

57a

Exhibit "J" Annexed to Affidavit of Markel.

Aug. 15th

The Floristry
Buffalo, N.Y.
Attn: Mr. Markel

Fanny —

Enclosed is a check in the amount of $20 as partial payment for the flowers for Ann's wedding last March 15th.

Since I did not hear from you and as we are going on vacation for 10 days, I wanted to pay something towards the account.

I will contact you or please send me the bill by mail. Allen would also like to settle his account for the Bride's bouquet etc. Thank you.

Jane Curtin

59a

88-7221, 88-7223, 88-7225

645

Exhibit "K" Annexed to Affidavit of Markel.

the floristry

DIV OF PANTHER CREATIONS LTD

641-4501

THE BUFFALO GATES CIRCLE FLORISTRY LTD.
1385 Delaware Ave.

THE FLORISTRY AT THE PARKLANE
33 Gates Circle, Buffalo, N.Y. 14209

885-6037

John T. Curtain
385 Starin
Buffalo, New York 14216
Saturday, June 20, 1981

1	Runner	$	30.00
6	Ferns on stands		N/C

1	Bouquet/Bride	35.00
1	Headpiece/Bride	10.50
1	Bouquet/Bridesmaids	25.00
1	Headpiece/Bridesmaid	4.50
8	White carnation boutonnieres @ 1.50	12.00
2	Corsages/Mothers @ 10.50 each	21.00
16	Baskets with flowers @ 8.50 each	136.00
1	Lace cloth	5.00
1	Purple liner.....	5.00
1	Cake flowers	c.s
	Greens.....	4.50
		$ 297.00
	Less 50% discount	148.50
		$ 148.50
	7% sales tax	10.40
	Total	$ 158.90

Thank You.

Florists and Decorators

Exhibit "O" Annexed to Affidavit of Markel.

J. Brunner, Inc.
2954 Seneca Street
West Seneca, New York 14224
823-4407

James P. Brunner

Member of
National Society of Public Accountants

Janet E. Brunner
Jacqueline R. Budziejko

The N.Y. Society of Independent Accountants

November 2, 1987

To whom it may concern:

According to our payroll records for "The Floristry" at 1385 Delaware Ave, Buffalo, NY 14209, Eileen J. Curtin was paid the following amount during 1981 and 1982.

1981

6/30	83.30	8/04	123.25	9/01	102.85	10/13	56.95
7/07	77.35	8/11	76.50	9/08	104.55	10/20	54.40
7/14	123.25	8/18	105.40	9/15	56.10	10/27	53.55
7/21	78.20	8/25	102.85	9/22	55.28		
7/28	104.55			9/29	56.95	TOTAL	$1,415.28

1982

7/20	51.09	8/24	77.05	
7/26	125.63	8/31	25.13	
8/10	74.54			TOTAL $353.44

Yours truly

J.P. Brunner
Bookeeper

63a

APPENDIX M

Portions of Joint Appendix Below
(Court of Appeals Docket No. 90-7336)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil No. 78-27C

GREATER BUFFALO PRESS, INC., et al,
Plaintiffs,

v.

FEDERAL RESERVE BANK OF
NEW YORK, et al,
Defendants.

MOTION FOR RECUSAL

Defendant moves the Court, and the Honorable John T. Curtin, U.S. District Judge for the Western District of New York, that he recuse himself from all consideration in this matter, and that defendants be barred from asserting the within claim for costs.

The within Motion is based upon the annexed Affidavit of Arnold Weiss sworn to September 28, 1989, and each of the matters, proceedings and items referenced, incorporated and included therein.

Dated: Buffalo, New York
September 28, 1989

RAICHLE, BANNING, WEISS
& STEPHENS
By Arnold Weiss, *Of Counsel*
A Member of the Firm
Attorneys for Plaintiffs
1400 Main Place Tower
Buffalo, New York 14202
Telephone: 716-852-7587

To: Brian J. Troy, Esq.
Attorney for Defendants
12 Fountain Plaza

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil No. 78-27C

GREATER BUFFALO PRESS, INC., et al,
Plaintiffs,

v.

FEDERAL RESERVE BANK OF
NEW YORK, et al,
Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

AFFIDAVIT OF ARNOLD WEISS

ARNOLD WEISS being duly sworn, deposes and says:

1. I am an attorney at law duly admitted to practice in this Court as well as before each of the other District Courts in the State of New York and other Districts, all of the State Courts of the State of New York, the United States Courts of Appeals for the Second and Fifth Circuits, and the United States Supreme Court.

2. I make the within affidavit in support of plaintiffs' motion for recusal of the Hon. John T. Curtin, U. S. District Judge for the Western District of New York, from all further consideraiton in this matter, and, in particular, with respect to defendants' present motion for costs by reason of allegedly inadequate answers to defendants' First Interrogatories.

3. Deponent also makes this affidavit in support of the within request to bar defendants from asserting said claim for costs for the reason that Ralph L. Halpern, Esq., an attorney at law, who was formerly a Senior Partner in deponent's firm, and who presently is a Senior Partner in defendants' attorney's firm, plaintiffs have, and hereby assert, a claim-over against said attorney with respect to defendants' entire claim for costs, or a major or just portion thereof, by way of apportionment, contribution and indemnification, by reason of which defendants' attorneys have a conflict of interest which bars them from any further participation herein with respect to said claim for costs.

4. Deponent recalls to the Court that he *previously* cited the fact that the late Frank G. Raichle, Esq., one of the nation's foremost litigation attorneys, advised and reviewed the preparation of plaintiffs' answer to defendants' First Interrogatories, reviewed the final product, and noted in writing thereon, "excellent job".

5. Since said Ralph L. Halpern, Esq. is the Executor of the Estate of said Frank G. Raichle, and since said Ralph L. Halpern, Esq. was closely involved with the late Frank G. Raichle and participated as an active partner with respect to all matters in which Mr. Raichle was involved, and assisted in the management of the Office, furnishes a further compelling reason why defendants' firm should be barred from this matter.

6. Deponent moves for recusal of Judge Curtin herein by reason of his long-standing bias against deponent, because of deponent's actions in bringing to light certain conduct of Judge Curtin which constitutes a marked departure on his papt from accepted standards of Judicial Conduct.

7. By reason of the foregoing, it is deponent's intention, and that of his client in the case of *Markel v. Scovill*, USDC:WDNY, 78-269, to move for judicial censure of Judge Curtin.

8. In view of the fact that deponent has heretofore made Judge Curtin aware of the intention to seek censure for the case before the Judicial Conduct Board of the Second Circuit, and the Second Circuit has already furnished deponent with the Official form prescribed for such request, it is clear that Judge Curtin can no longer preside in an unbiased manner herein.

9. Deponent has made similar requests for the recusal of Judge Curtin in all other litigated matters in which deponent represents a sole party, or a party which is not aligned in interest with another party represented by independent counsel, such that any bias by Judge Curtin would also affect said independent party and counsel, including the cases of *Person v. General Motors Corporation*, 89-737, and

10. Whatever bias Judge Curtin may have had before, deponent believes the case of *Ada Mae Dowell v. General Motors Corporation*, 78-840 exacerbated the Judge's prejudice. In that case, Judge Curtin, in order to prevent Mrs. Dowell from being barred by the six-month Statute of Limitations under LMRA Sec. 301, by reason of his *own failing* to file the Complaint for almost eight months, altered the date of filing on the document.

11. Deponent sought to dismiss the Complaint in the *Ada Mae Dowell* case and moved for Judge Curtin's recusal from that case, as well as others in which deponent was the attorney.

12. That motion was filed in the late afternoon, and early the next morning, Judge Curtin called deponent's partner, William Stephens, at home in an excited state and asked whether Frank Raichle was aware of the motion that deponent had filed.

13. Later that day, the "most senior of the senior partners", Frank Raichle, in the firm of Raichle, Banning, Weiss & Halpern, told deponent of his concern about the power of a Federal Judge, and pressured deponent to withdraw his motion. Deponent withdrew the motion "without prejudice".

14. I am also counsel for plaintiffs in the case of *Markel vs. Scovill, et al* which is pending in this District under Docket No. 78-269-A (deponent incorporates herein by reference and makes a part hereof all of the pleadings, correspondence, affidavits, documents and proceedings in the action of *Markel vs. Scovill*, including the proceedings before the U. S. Court of Appeals before the Second Circuit, Appeal Docket No. 88-7221, 88-7223 and 88-7225), wherein Judge Curtin, after oral argument before the Court of Appeals, requested reconsideration and reversed his previous refusal for three years before the decision to recuse himself.

15. In the case of *Markel v. Scovill*, the recusal issue devolved upon Judge Curtin's and his family's, requests for several financial favors, as well as employment for Judge Curtin's daughter, from plaintiff, Fannye Markel, during the pendency of the lawsuit at which he presided.

16. Deponent asserted that a Judge cannot receive favors from a litigant in a lawsuit because he may, in order to appear unbiased, by reason of those favors, rule against the litigant and thus violate his rights.

17. A series of Court decisions involving judicial conflict of interest mandated recusal in cases of judicial conflict of interest, both with respect to direct bias and reverse bias.

18. A further cause for censure of Judge Curtin's conduct will be included in the future claim that Judge Curtin's Decision of April 7, 1987 contained false statements by Judge Curtin concerning a fictitious, and non-existent, alleged meeting with deponent and deponent's client, plaintiff Fanny Markel. Judge Curtin falsely claimed in his opinion that said meeting occurred, and that Mrs. Markel and deponent were present in his office at a meeting, and during the meeting they allegedly waived the question of Judge Curtin's recusal, and allegedly consented to his sitting on the case—all of which is without any foundation in fact.

19. Judge Curtin's false statement in his Decision of April, 1987 was deligently inquired into by the Judges of the U.S. Court of Appeals on the oral argument of plaintiff's Appeal, in the course of which deponent vigorously asserted that the statement in Judge Curtin's opinion was *not* truthful; that *no* such meeting ever occurred at which Judge Curtin either sought or was granted plaintiffs' consent to his sitting on the case, despite his conflict; that, in any event, additional and serious recusal mandating events occurred repeatedly after the alleged meeting; that immediately after said serious recusal mandating events, deponent on November 21, 1985 personally wrote to Judge Curtin and requested recusal by reason thereof; that on February 1, 1986, Judge Curtin wrote to deponent and requested that plaintiffs' counsel to give his "final word" on whether or not Judge Curtin should recuse himself; that plaintiffs' counsel on February 28, 1986 gave Judge Curtin his "final word" and requested recusal.

20. Subsequent to the oral argument in the Court of Appeals in *Markel v. Scovill*, Richard E. Moot, Esq., defendants' counsel, wrote a letter to the Court of Appeals, in which he stated that the subject of Judge Curtin's daughter's employment had been raised *for the first time* only after the Judge's April 7th Decision.

21. Thus, defendants' attorney contradicts Judge Curtin's own claim in the April 7th Decision that the subject of his daughter's employment had been discussed, and the issue was waived long *before* his April 7th Decision.

22. Judge Curtin further demonstrated his bias against deponent in refusing to accept a settlement worked out by the parties before U.S. Magistrate Edmund F. Maxwell in August, 1987 in the *Markel* case, and overruled the Magistrate's Report and Recommendation, stipulated to by all counsel, that the settlement be approved, even though the settlement had previously been reviewed with, and tentatively approved by, Judge Curtin in the course of a telephone conference in which Magistrate Maxwell, deponent, deponent's Legal Assistant and Richard E. Moot, Esq. all participated.

23. In his oral argument before the Court of Appeals, deponent rhetorically asked the Court whether, in fact, he was not being sanctioned merely for bringing to light the facts and truth that were involved in the recusal motion.

24. The case of *Markel v. Scovill* was later transferred by the Clerk, at Judge Curtin's Order, to the Honorable Richard J. Arcara, another U. S. District Judge for the Western District of New York, where the matter, and all related matters which deponent and his clients previously have urged before Judge Curtin, and the U. S. Court of Appeals, are pending.

25. In the matter herein, the *FRB* case, Judge Curtin's unjust award of sanctions against deponent with respect to defendants' 279 oppressive, burdenson and harassing Interrogatories constitutes further evidence of his bias.

26. During the argument thereon, Judge Curtin observed in Court, and on the record, that the FRB Interrogatories were "oppressive" to deponent. Nevertheless, in his written decision, he awarded sanctions against deponent, rather than striking or limiting the Interrogatories, as would be expected from his comments from the bench.

27. Deponent believes that Judge Curtin's bias has intensified by the events in the approximately 12 years between his Decision to hold the matter of costs in abeyance in the *FRB* case, and his final Decision to award them.

28. Remarks have been made to deponent by persons in attendance in the Courtroom, evidently based on the Judge's grimaces and hostile responses to deponent, that Judge Curtin does not like deponent.

29. The sensitive issues involved herein, the request for Official censure, and the embarrassment which will necessarily flow therefrom, should be sufficient grounds for Judge Curtin's recusal.

30. By reason of the foregoing, deponent consistently has requested, and will continue to request, the Clerk of the U.S. District Court at the time of filing actions, including Petitions for Removal, that actions be assigned to *any* other Judge of the District, other than Judge Curtin, by reason of Judge Curtin's bias and hostility; and by reason thereof, Judge Curtin recently recused himself in *Hudson v. General Motors Corporation*.

WHEREFORE, deponent requests that Judge Curtin recuse himeself herein, and from all other matters in which deponent appears as counsel, in order that the appearance and ends of justice may be served, and that the reputation of Judge Curtin, and the Court may be maintained and preserved; together with such other relief as may be just, including barring defendants' attorneys.

ARNOLD WEISS

Sworn to before me this
28th day of September, 1989.
MARIA E. DOLAN
Notary Public

MARIA E. DOLAN
NOTARY PUBLIC
STATE OF NEW YORK, COUNTY OF ERIE
My Commission Expires 3/3/90.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 78-27-C

GREATER BUFFALO PRESS, INC., et al;
Plaintiffs,

v.

FEDERAL RESERVE BANK OF
NEW YORK, et al;
Defendants.

PLAINTIFFS' MOTION TO AMEND
ORDER AND SUPPLEMENT RECORD

Plaintiffs move the Court pursuant to FRCP Rules 52(b) and 60(a), and FRAP Rule 10(e), to amend and correct the Decision and Order entered herein on January 26, 1990, and to supplement the record herein for purposes of appeal, by:

1. Incorporating therein the Record in *Ada Mae Dowell v. General Motors Corporation*, (Civil 78-840), referred to at page 6 of the Court's Decision and Order, including:

A. The original Complaint dated December 12, 1978, showing the obliterated Clerk's July 23, 1979 filing stamp and 1979 Civil Action Number, and alteration to a December 12, 1978 filing date and 1978 Civil Action Number;

B. The Order of July 23, 1979 permitting filing of the Complaint *in forma pauperis*;

C. The U.S. Marshall's Process Receipt and Return dated July 25, 1979;

D. Defendant's initial Answer dated August 24, 1979;

E. Defendant's Amended Answer and Motion to Dismiss, both dated September 3, 1979, and Defendant's Answer dated September 17, 1980 to the Amended Complaint, filed after learning of the foregoing; and,

F. Court Docket to show absence of Court ruling on Defendant's Motion and Defenses re altered date.

2. Incorporating therein the Record in *Markel, et al. v. Scovill, et al.*, (Civil 78-269), referred to at pages 5-6 of the Court's Decision and Order, including:

A. Letter of November 21, 1985 from Arnold Weiss to Judge Curtin, filed December 29, 1986 (Item No. 155);

B. Letter of November 25, 1985 from Richard Moot to Judge Curtin, filed December 29, 1986 (Item No. 157);

C. Letter of November 26, 1985 from Arnold Weiss to Judge Curtin, filed December 29, 1986 (Item No. 158);

D. Letter of February 5, 1986 from Richard Moot to Judge Curtin (Not filed by Court - included in Motion for Recusal filed January 4, 1988, Item Nos. 182-6);

E. Letter of February 11, 1986 from Judge Curtin to Arnold Weiss (Not filed by Court - included in Motion for Recusal filed January 4, 1988, Item Nos. 182-6);

F. Letter of February 28, 1986 from Arnold Weiss to Judge Curtin, filed December 29, 1986 (Item No. 160);

G. Declaration of Richard Moot dated March 11, 1986 in opposition to request for recusal (Item No. 149);

H. Letter of March 17, 1986 from Arnold Weiss to Judge Curtin, filed December 29, 1986 (Item No. 161);

I. Decision and Order dated April 7, 1987 denying recusal and granting summary judgment (Item No. 163);

J. Richard Moot undated Declaration and attached Time Sheets (Item No. 164) showing calls to and conferences with Plaintiffs' Special Counsel Alvin Glick.

K. Plaintiffs' Objections, etc., (Item No. 165);

L. Plaintiffs' list of witnesses (Item No. 166);

M. Affidavit of Fannye Markel sworn to August 24, 1987 (Item No. 167);

N. Proceedings of August 25, 1987 before Magistrate Maxwell (Item No. 168);

O. Proceedings of August 27, 1987 before Magistrate Maxwell (Item No. 169);

P. Magistrate Maxwell's Report and Recommendation dated September 9, 1987 (Item No. 170);

Q. Declaration of Richard Moot dated September 21, 1987 and attached Subpoenas (Item No. 172);

R. Plaintiffs' Motion of December 4, 1987 to confirm Settlement and for sanctions, and attached Affidavits of Arnold Weiss and Fannye Markel (Item No. 176);

S. Statement of Arnold Weiss dated December 4, 1987 in support of above Motions (Item Nos. 177 & 179);

T. Plaintiffs' Motion for Reconsideration of Recusal, and attached Affidavits of Fannye Markel, Arnold Weiss and Rita Weiss, including Exhibits (Item Nos. 182-4);

U. Plaintiffs' Memorandum of Law (Item No. 185);

V. Plaintiffs' Statement in Response (Item No. 186);

W. Proceedings of January 15, 1988 (Item No. 189);

X. Decision and Order of February 10, 1988 denying Recusal, rejecting Settlement and Magistrate's Recommendation and granting sanctions (Item No. 188);

Y. Notice of Appeal, District Court Docket, and Joint Appendix and Briefs on Appeal;

Z. Letter of August 19, 1988 from Richard Moot to U.S. Court of Appeals referred to in ¶¶20 and 21 of Affidavit of Arnold Weiss, sworn to September 28, 1989, establishing that plaintiffs had not waived recusal;

AA. Judge Curtin's communications with Second Circuit or Judges thereof re his Reconsideration of Recusal;

AB. Court of Appeals Mandate filed with District Court on September 28, 1988 returning file;

AC. Judge Curtin's Order of October 31, 1988 granting Recusal on reconsideration (filed November 1, 1988);

AD. Plaintiffs' Notice dated December 6, 1988 of Deposition and Production of Judge Curtin and former Clerk, Alvin Glick, and others.

3. Incorporating therein the Record in *Person v. General Motors Corporation*, (Civil 89-737), referred to at page 2 of the Court's Decision and Order, including:

A. Motion for Recusal dated July 21, 1989, and Affidavit of Arnold Weiss sworn to July 21, 1989, with prior notice to Judge Curtin in ¶14 of intent to request Censure.

4. Amending and correcting the finding at page 7 that Judge Curtin did not recuse himself in *Hudson v. General Motors Corporation*, (Civil 88-250) and incorporating therein:

A. The Proceedings in Chambers on November 7, 1988 re Defendant's Request for Recusal of Judge Curtin;

B. The Proceedings of January 26, 1989 before Judge Curtin granting Defendant's Request for Recusal; and,

C. Judge Curtin's Order of January 27, 1989, entered February 3, 1989, granting Defendant's Motion for Recusal, and transferring action to Judge Arcara.

5. Amending the findings of the Court at pages 5, 13 and 14 by deleting the following findings as unsupported in the Record, or, alternatively, amending said findings with specific references to facilitate review on appeal:

A. "... Mr. Weiss has ignored the orders of the Court by submitting unresponsive and, at times frivolous responses ... ";

B. "... he continue(d) submitting unresponsive and ... improper findings ... to delay this case";

C. "Some of the allegatioins are threatening in nature, and clearly have no place in an application for recusal"; and,

D. "... a good part of the affidavits are immaterial, speculative and threatening".

This Motion is supported by the annexed Affidavit of Arnold Weiss, sworn to February 5, 1990, and the pleadings, proceedings and documents referred to herein, which will be filed with the Court forthwith.

DATED: Buffalo, New York
February 5, 1990

RAICHLE, BANNING, WEISS
& STEPHENS
By: ARNOLD WEISS
Attorneys for Plaintiffs
410 Main Street
Buffalo, New York 14202
Telephone: (716) 852-7587

TO: Brian J. Troy, Esq.
Jaeckle, Fleischmann & Mugel
700 Norstar Building
Buffalo, New York 14202

Thomas C. Baxter, Jr., Esq.
Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045

Attorneys for Defendants

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will submit the within Motion for determination without oral argument.

DATED: Buffalo, New York
February 5, 1990

RAICHLE, BANNING, WEISS
& STEPHENS
By: ARNOLD WEISS
Attorneys for Plaintiffs
410 Main Street
Buffalo, New York 14202
Telephone: (716) 852-7587

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civil 78-27-C

GREATER BUFFALO PRESS, INC., et al;
Plaintiffs,

v.

FEDERAL RESERVE BANK OF
NEW YORK, et al;
Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

AFFIDAVIT OF ARNOLD WEISS

ARNOLD WEISS, being duly sworn, deposes and says:

1. I am the attorney for plaintiffs herein and make this affidavit in support of the within motion to amend the Decision and Order of this Court dated January 26, 1990 and to supplement the Record herein for purposes of appeal.

2. Deponent believes that Judge John T. Curtin, despite his statements to the contrary, has a hostile and biased attitude against deponent, and that Judge Curtin's Decision and Order of January 26, 1990 should be amended and supplemented with specific references.

3. Deponent believes that said hostility and bias was intensified in large part when deponent, acting on the request of his client, the defendant in the case of *Ada*

Mae Dowell v. General Motors Corporation (Civil 78-840), faulted Judge Curtin for unilaterally, and without disclosing the fact, causing the Clerk's July 23, 1979 filing stamp and the Clerk's assigned 1979 Civil Action Number to be obliterated and altered to a December 12, 1978 filing date and a 1979 Civil Action Number without notice to the defendant or deponent, and without revealing the fact thereof, and apparently attempting to suppress the fact thereof.

4. Although deponent filed affirmative defenses in defendant's Answers in the *Ada Mae Dowell* case, as well as a motion to dismiss, the Court never ruled thereon, and defendant had to dispose of the case by settlement.

5. A reasonable person would question whether Judge Curtin subsequently retaliated against deponent for raising the alteration of dates in the *Ada Mae Dowell* case, since the decision to grant sanctions against deponent was made while the *Ada Mae Dowell* issues were in contention.

6. A reasonable person would question the Court's ability to remain unbiased in view of the circumstances surrounding deponent's request for recusal in the case of *Markel, et al v. Scovill, et al* (Civil 78-269), i.e., the Curtins' requests for financial favors and employment opportunities for their daughter from plaintiff in the *Markel* case.

7. In the *Markel* case, Judge Curtin claimed in his Decision of April 7, 1986, which denied recusal and granted summary judgment to defendants, that deponent and plaintiffs had waived the matter of recusal in 1984; however, this was contradicted by Judge Curtin's letter of February 11, 1986 to deponent (which the Court did not file with the Record), which requested deponent's "last word" on recusal, and deponent's letters

of February 28, 1986 and March 17, 1986 to Judge Curtin requesting recusal, as well as by the letter of August 19, 1988 of Richard Moot to the U. S. Court of Appeals.

8. A reasonable person could consider that Judge Curtin is retaliating against deponent for disclosing to the U. S. Court of Appeals the attempts to obtain financial considerations and personal employment favors for his daughter from plaintiffs in the *Markel* case then pending before him, after which Judge Curtin reconsidered and rescinded his Decision of April 7, 1987, and thereby recognized that there were ample grounds for recusal.

9. Although Judge Curtin denies that the foregoing has had any effect on his attitude toward deponent and his clients, Judge Curtin's actions appear to deponent to contradict Judge Curtin's contention, i.e.:

A. Judge Curtin did not file the letters referred to in ¶¶2a-d, f and h with the Clerk of the Court until one year after the receipt thereof, thus indicating a sensitivity;

B. To deponent's knowledge, Judge Curtin never filed with the Record his letter of February 11, 1986 to deponent, in which he asked for deponent's "final word on recusal" (Motion Item 2e—later filed by plaintiffs with motion for recusal filed January 4, 1988);

C. Judge Curtin refused to allow plaintiffs' counsel, Daniel Mason, Esq. and deponent, to orally present their motion for recusal on the oral argument on January 15, 1988, but instead, solicited the opinion of Richard Moot, Esq., defendants' counsel;

D. Whenever cases involving deponent's requests for recusal of Judge Curtin are on the motion calendar, and regardless of the position on the calendar Judge Curtin invariably defers them to the end of the calendar, when the courtroom is cleared, or hears the matters in Chambers; (See for example, page 2 of proceedings of January 15, 1988—Motion ¶2V); and,

E. Judge Curtin refuses to admit that deponent's revelations of seeking financial considerations and employment opportunities from plaintiff in the Markel case can be a cause for bias by him.

10. Judge Curtin's Decision and Order of January 26, 1990 finds that deponent failed to make of Record herein the details of the reasons for his recusal.

11. However, each of said matters was well known to Judge Curtin, and within his own personal knowledge, and, moreover, deponent incorporated in his affidavit by reference each of the cases involving the same.

12. However, in order to facilitate review on appeal by the U.S. Court of Appeals, all of the facts—known to Judge Curtin—set forth in ¶¶1, 2 and 3 of the within motion—should be incorporated in the Record.

13. It is also necessary to amend and correct Judge Curtin's finding herein that he did not recuse himself in the case of *Hudson v. General Motors Corporation* (Civil 88-250) by incorporating the proceedings wherein he was, in fact, asked to recuse himself, and he did, in fact, recuse himself.

14. Deponent has never threatened the Court, or submitted any unresponsive, frivolous, improper or threatening affidavits, allegations or statements, as asserted by the Court at pages 5, 13 and 14 of said Decision and Order of January 26, 1990.

15. It is necessary that the Record be amended by deleting said statements or, alternatively, amending said findings with specific reference to each claimed unresponsive, frivolous, improper and threatening allegation or statement by deponent, so that deponent can have the Court of Appeals properly review the same.

16. Deponent has always respected the position of a United States District Judge, notwithstanding Judge Curtin's actions toward deponent, and, quite the contrary, initially, and over a two-year period, requested recusal of Judge Curtin on an informal basis, i.e., by letters and oral requests, in order to preserve the dignity of the Court and not publicize Judge Curtin's improper actions.

17. Deponent has never threatened the Court and does not know of any statement, written or oral, which could even be deemed as a semblance of a threat, and is unaware of any basis for Judge Curtin's statement in his Decision and Order that deponent made "threatening" statements.

18. Judge Curtin may have had in mind the statement of fact in ¶¶7 and 29 of deponent's affidavit of September 28, 1989 that deponent intended to seek official censure of Judge Curtin before the Judicial Conduct Board of the Court of Appeals for the Second Circuit. However, deponent, in those two paragraphs, was simply complying with the Court's request to furnish "reasons" why the Court should recuse itself.

19. It is natural that a Judge will bear resentment against any attorney who, however justifiable his reasons may be, requests that a Judge be censured. Deponent therefore, properly included this as a reason for recusal.

20. Deponent had previously informed Judge Curtin by affidavit sworn to July 21, 1989 in the case of *Person v. General Motors Corporation* (Civil 89-737) that deponent intended to seek such official censure. Therefore said statement could not be deemed a threatening statement, but rather, a statement of fact of plaintiffs' and deponent's rights, obligations and duties with respect to misconduct by a District Judge.

21. Deponent is forthwith filing with the Court a binder of the pleadings, documents and proceedings referred to in the motion.

WHEREFORE, deponent requests that the Court amend and correct its Decision and Order entered January 26, 1990 and supplement the Record herein for purposes of appeal, as requested by the within motion.

ARNOLD WEISS

Sworn to before me this
5th day of February, 1990.
MARIA E. DOLAN

MARIA E. DOLAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 3, 1990

1340
Letter Dated March 21, 1990 From Judge Curtin to Arnold Weiss.

173

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
634 U. S. COURT HOUSE
BUFFALO, NY 14202

CHAMBERS OF
JOHN T. CURTIN

(716) 846-4231
FTS 437-4231

FILED
90 JUN -7 AM 10:02
U.S. DISTRICT COURT
W.D.N.Y.-BUFFALO

March 21, 1990

Arnold Weiss, Esq.
410 Main Street
Buffalo, New York 14202

Re: Greater Buffalo Press, Inc. et al.
v. Federal Reserve Bank of New York, et al.
CIV-78-27C

Dear Mr. Weiss:

With regard to your letter of March 16, 1990, if I had any correspondence with the Court of Appeals regarding the above-referenced case or the case of Markel v. Scovill, it would not be available for your review.

If you believe there are any additional materials to which you are entitled, I suggest that you make an appropriate motion.

Yours truly,

JOHN T. CURTIN
United States District Judge

87a

Ordered filed
by JTC. 6/6/90.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. No. 78-CV-0027-C

U.S. Court of Appeals
Docket No. 90-7336

GREATER BUFFALO PRESS, et al.
Plaintiff/Appellant,

vs.

FEDERAL RESERVE, et al,
Defendants-Appellees.

MOTION TO SUPPLEMENT DESIGNATION
OF RECORD ON APPEAL

Plaintiff moves the Court to direct the Clerk of the court to add to, and supplement, plaintiff/appellant's Designation of the Record on Appeal herein, Docket Nos. 167 and 168 (Record on Appeal Items Nos. 145 and 146) being Supplemental Binders A and B referred to in deponent's Affidavit of February 5, 1988 as part of deponent's Motion to Amend the Court's Order of January 26, 1990 by supplementing the Record herein.

The within Motion is based on the annexed Affidavit of Arnold Weiss sworn to January 8, 1990; the order of this Court of January 26, 1990 awarding attorneys fees and Rule 11 sanctions, and denying plaintiff's Motion for Recusal of Honorable John T. Curtin; the Order of this Court filed February 15, 1990 directing that Supplemental Binders A and B be filed with the Court

by February 20, 1990; and the Order of this Court filed March 6, 1990 denying plaintiff's Motion to Supplement the Record.

Dated: Buffalo, New York
June 8, 1990

ARNOLD WEISS, Pro Se
Raichle, Banning, Weiss
& Stephens
Attorneys for Plaintiff/Appellant
410 Main Street
Buffalo, New York 14202
Teoephone: 716-852-7587

To: Thomas J. Baxter, Esq. via Fax #212-785-5748
Federal Reserve Bank of New York
33 Liberty Street
New York, New York 10045

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 78-CV-0027-C

U.S. Court of Appeals
Docket No. 90-7336

GREATER BUFFALO PRESS,
Plaintiff/Appellant,

vs.

FED RESERVE, ET AL,
Defendants/Appellees.

AFFIDAVIT OF ARNOLD WEISS

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

ARNOLD WEISS, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs herein, who previously appealed to the U. S. Court of Appeals for the Second Circuit from a Decision of this Court entered March 17, 1988 which dismissed the Complaint herein, which dismissal was affirmed by the U. S. Court of Appeals by its Decision dated January 18, 1989, which is reported in 866 F2d 38.

2. By Orders dated December 31, 1980 and January 26, 1990, this Court entered Orders awarding attorneys' fees and Rule 11 sanctions against deponent personally in the amount of $12,705.15 and $3,360.00, respectively, for claimed failure to properly respond to defendants'

First Interrogatories and for urging recusal of Hon. John T. Curtin, U. S. District Judge, from consideration of the issues of attorneys' fees and Rule 11 sanctions herein.

3. Deponent's motion dated September 29, 1989 for recusal of Judge Curtin therefrom alleged retaliation and bias against deponent, and relied on references to other cases then or formerly pending in the U. S. District Court for the Western District of New York, and appealed to the Second Circuit, the records for which were voluminous and which were in the possession of the Clerk of the Court. In order to conserve expense and bulk, and in the spirit of the Paper Reduction Act, deponent, on said motion, incorporated portions of said cases therein by "reference" rather than by attaching the same at length.

4. By Order dated January 26, 1990, the Court refused to consider deponent's "references" to said other then or theretofore pending cases because deponent had not set the same forth in full in his affidavit.

5. On February 5, 1990, deponent moved to amend said Order of January 26, 1990 by supplementing his affidavit and motion dated September 29, 1989 with the actual portions of said other cases which he had incorporated therein by "reference" as Supplemental Binders "A" and "B".

6. By Order dated February 15, 1990, the Court directed deponent to file said Binders "A" and "B", and deponent did so, and they were assigned Docket Items Nos. 167 and 168.

7. Thereafter, on February 21, 1990, deponent filed Supplemental Binder "A" and Supplemental Binder "B", which consisted of approximately 2,000 pages of the pleadings and proceedings in said referenced cases before this Court in which the plaintiffs were involved.

8. On March 6, 1990, the Court denied deponent's motion to add Supplemental Binders "A" and "B" to deponent's said motion and affidavit for recusal.

9. Said Order of March 6, 1990, having been the final Order herein, deponent appealed, *pro se*, on April 4, 1990 to the U. S. Court of Appeals for the Second Circuit from Orders of this Court dated December 31, 1980, January 26, 1990 and March 6, 1990.

10. Deponent's *pro se* appeal has been assigned Docket No. 90-7336 by the U. S. Court of Appeals.

11. By Scheduling Order No. 2 of said Court, the Record on Appeal must be filed by Monday, June 11, 1990, and the Joint Appendix and Appellant's Brief must be filed by June 18, 1990.

12. Thereafter, deponent, as said *pro se* appellant, prepared Appellant's Designation of the "Record on Appeal" on said appeal, and he submitted the same to counsel for the appellees, as well as to Ms. Carole Wright, the Appeals Clerk of this Court.

13. Included in deponent's said Designation of the Record on Appeal are Supplemental binders "A" and "B", Docket Items 167 and 168.

14. On Tuesday, June 5, 1990, deponent also submitted to counsel for the appellees appellant's Designation of the contents of the printed Joint Appendix, which Joint Appendix includes substantial portions of said Supplemental Binders "A" and "B".

15. On Thursday, June 7, 1990, while deponent was on trial in another matter, Ms. Carole Wright called in reference to proposed Record on Appeal Items 145 and 146 (Docket Items 167 and 168) and Supplemental Binders "A" and "B", and stated to deponent's

secretary, Ms. Virginia Grimes, that Supplemental Binders "A" and "B" *cannot* be included in the Record on Appeal, per Judge Curtin's directions.

16. Ms. Wright said she would be glad to discuss the matter with deponent. However, she said that Judge Curtin had denied the motion, and would *not* allow them to be in the Record on Appeal.

17. Deponent, because of a trial he then was engaged in, was unavailable to speak to Ms. Wright directly, and so directed Ms. Grimes to call Ms. Wright back and inform her that Supplemental Binders "A" and "B" *had* to be included in the Record on Appeal, since deponent was appealing not only from Judge Curtin's Order awarding the aforesaid attorneys' fees and Rule 11 sanctions, but also appealing from Judge Curtin's Order of January 26, 1990 denying deponent's motion of September 29, 1989 for recusal of Judge Curtin, but also from Judge Curtin's Order of March 6, 1990 refusing to supplement the Record on Appeal with said Supplemental Binders "A" and "B" (Docket Items 167 and 168).

18. Deponent asked Ms. Grimes to *emphasize* to Ms. Wright that the Court of Appeals could *not* consider the appeal from the Order of March 6, 1990 refusing to include Supplemental Binders "A" and "B" unless the Court was aware of the contents of said Supplemental Binders "A" and "B", and thus, it was relevant to the appeal.

19. Ms. Wright replied to Ms. Grimes as follows:

> "No, it cannot be in the Record. I have to follow the Judge's instructions, and he said 'No.' If Mr. Weiss deisres to speak to Judge Curtin or to Mr. Kaplan (Michael J. Kaplan, Clerk), he can do so, but I can do nothing."

20. Deponent accordingly moves the Court to direct the Clerk of the Court, and Ms. Carole Wright, the Appeals Clerk of the Court, to include Docket Items 167 and 168, being Supplemental Binders "A" and "B", in the Record on Appeal designated by deponent, since deponent also is appealing from Docket Item 170, which is this Court's Order of March 6, 1990 denying deponent's motion to amend the Order of January 26, 1990 (Docket Item 163) and supplement the Record, especially in view of the Court's Order of February 15, 1990 (Docket Item 165) directing deponent to file Supplemental Binders "A" and "B".

21. Supplemental Binders "A" and "B" accordingly are records of this Court which have been assigned Docket Items 167 and 168, respectively, and were filed pursuant to the Order of this Court dated February 15, 1990 (Docket Item 165), all *prior* to deponent's Notice of Appeal filed April 4, 1990.

WHEREFORE, deponent requests that the Court rescind its direction to Ms. Carole Wright, Appeals Clerk of this Court, not to include said Supplemental Binders "A" and "B" (Docket Items 167 and 168) in the Record on Appeal herein and/or issue a formal Order that said filed docket items be made part of the Record on Appeal herein and transmitted to the Court of Appeals for consideration of deponent's appeals, and granting such other and further relief to deponent as may be just and proper.

ARNOLD WEISS

Sworn to before me this
8th day of June, 1990.

/S/ MARIA E. DOLAN

MARIA E. DOLAN
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 3, 1992

APPENDIX N

Portions of Suppressed Recusal Binder A United States District Court Docket Item No. 167 (from *Hudson vs. General Motors*—United States District Court Civil 88-0250)

RAICHLE, BANNING, WEISS & STEPHENS
ATTORNEYS AT LAW

1400 Main Place Tower · Buffalo, New York 14202-3714

Telephone: (716) 852-7587
Telecopier: (716) 852-7599

January 26, 1989

HAND DELIVERY

Hon. John T. Curtin
United States District Court
United States Courthouse
Niagara Square
Buffalo, New York 14202

Re: James A. Hudson vs. General Motors Corp.
Civ. 88-0250C

Dear Judge Curtin:

When we appeared before Your Honor on November 17, 1988, you asked if we had any objection to Your Honor's continuing to preside in this matter. We indicated that the matter should be deferred in view of an iminent settlement. We also made reference to the matters pending before Judge Arcara.

On January 6 Mr. Schwan's office indicated that the settlement is not possible at this time.

Accordingly, we now request that Your Honor recuse himself in this matter, and request the Clerk to reassign it to one of the other Judges in this District.

Very truly yours,

ARNOLD WEISS

vg
cc: W. James Schwan, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FILED
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U.S. DISTRICT COURT
W.D.N.Y.—BUFFALO

DATE: January 27, 1989

RE: JAMES A. HUDSON V. GENERAL MOTORS CORPORATION, et al., CIV-88-250

The above case is to be transferred from Judge Curtin to Judge Arcara.

JOHN T. CURTIN
United States District Judge

DOCKET CLERK:
Reassign case as indicated above.

(2)

No. 90-1540

Supreme Court, U.S.
FILED
APR 30 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ARNOLD WEISS, ESQUIRE,

Petitioner,

—vs.—

FEDERAL RESERVE BANK OF NEW YORK, and the Buffalo, New York branch thereof; John T. Kean, Individually and as an Officer and Manager thereof; MARINE MIDLAND BANK, N.A. (formerly Marine Midland Bank-Western),

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. BAXTER, JR.
Associate General Counsel
Federal Reserve Bank of
New York
33 Liberty Street
New York, New York 10045
(212) 720-5035

Counsel for Respondents

Of Counsel:

Ernest T. Patrikis
General Counsel

Joseph H. Sommer
Attorney

QUESTIONS PRESENTED

(1) Can a Federal judge ever rule on a petition to recuse himself?

(2) Can a Federal judge sanction an attorney for a recusal petition, if it has no chance of success and is filed to delay and to harass?

(3) Should a record on appeal be expanded to include material upon which a District Court judge did not rely or review, and which was offered to the District Court after its decision had been issued?

(4) Can a lawyer seek disqualification of a judge who is alleged to be biased against the lawyer, where there is no possibility of bias toward a party and where the bias alleged results from an adverse ruling in an unrelated case?

STATEMENT BY CORPORATE RESPONDENT

The Respondent, Federal Reserve Bank of New York, is a corporation chartered under the laws of the United States pursuant to the Federal Reserve Act. 12 U.S.C. § 226 *et seq.* Respondent has no parent company nor does it have any partially-owned subsidiaries or affiliates. Although stock of the respondent is owned by member commercial banks within the Second Federal Reserve District, none of the shareholders control the respondent. This statement is made pursuant to Supreme Court Rule 29.1.

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JURISDICTIONAL STATEMENT

Petitioner did not comply with S. Ct. R. 14.1(i), necessitating a jurisdictional statement by respondent. In the court of first instance, Federal subject matter jurisdiction of the action on the merits, an action that was decided in favor of the New York Fed, was based on 12 U.S.C. § 632 and 28 U.S.C. § 1331. *Greater Buffalo Press, Inc. v. Federal Reserve Bank of New York*, 866 F.2d 38 (2d Cir.), *cert. denied*, 490 U.S. 1107 (1989). The petition concerns collateral orders issued by the district court after the judgment in the underlying action became final.

STATEMENT OF THE CASE

This is a case about bad lawyering, and about a lawyer who, before moving for recusal of the district court judge, failed to make a reasonable inquiry into the law governing recusal and who used recusal motions for improper purposes. After making four baseless recusal motions, the lawyer was sanctioned by the district court. The court of appeals affirmed the sanction after determining that the district court did not abuse its discretion.

The court of appeals found that: (1) the conduct of Judge Curtin was not properly in issue because 28 U.S.C. § 455(a) requires recusal only where there is a possibility of bias toward a party, and not where there is a possibility of bias toward a lawyer; (2) there was no evidence of any judicial bias whatsoever toward the plaintiff, Greater Buffalo Press, at any time during the decade-spanning history of the case on the merits; and (3) the district court did not abuse its discretion in sanctioning "a frivolous and repetitive recusal motion." Pet. App. at 6a-7a.

Petitioner has apparently abandoned two contentions that he pursued in the court of appeals: (1) that a Fed. R. Civ. P. 37 sanction assessed against him by the district court represented an abuse of discretion (Pet. App. 7a), and (2) that the New York Fed's counsel should have been disqualified (Pet. App. 8a). His arguments now are confined to the Fed. R. Civ. P. 11 sanction that was assessed against him, but it is important to recognize that petitioner has also been sanctioned for conduct unrelated to recusal. Although the petitioner's conduct that earned him the Rule 37 sanction and his frivolous attempt at attorney disqualification provide an important background for the Rule 11 sanction, we will limit our discussion to the issues raised in the petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Can a Federal judge ever rule on a petition to recuse himself?

Stripped of petitioner's verbiage, the actual question propounded by petitioner sounds foolish. But this is his question. Petitioner would have it that, once the words "judicial misconduct and personal bias" are murmured by an attorney, intercession by another district judge is automatically required. Petitioner suggests a procedure that would become a splendid tool for judge-baiting, and for delay. But of equal importance, the suggested procedure is contrary to statute and without a Constitutional basis.

Petitioner's suggested procedure is inconsistent with 28 U.S.C. § 455, which speaks in terms of judicial *self*-recusal. Therefore, petitioner seems to want that statute declared unconstitutional. Perhaps that is petitioner's Due Process argument. But plenty of Due Process was afforded in this case, and it is nobody else's fault that petitioner did not seek a writ of mandamus—the conventional remedy for such situations.[1] His failure to seek this writ is perfectly consistent with judge-baiting; it is only inconsistent with a genuine grievance.

II. Can a Federal judge sanction an attorney for a recusal petition, if it has no chance of success and is filed to delay and to harass?

There is no magic in applying Rule 11 standards to a motion for recusal,[2] especially when the Rule's simple stan-

---

1 "[T]here are 'few situations more appropriate for mandamus than a judge's clearly wrongful refusal to disqualify himself.' *Rosen v. Sugarman*, 357 F.2d 794, 797 (1966)." *In Re International Business Machines Corp.*, 618 F.2d 923, 926 (2d Cir. 1980).

2 To our knowledge, no court that has considered Rule 11 sanctions for frivolous recusal motions has seen anything unusual about the

dards are applied to a motion made for the fourth time! The Rule, of course, requires that the signer conduct a reasonable inquiry into the facts and the law, and be satisfied that the document is well grounded in both, and be acting without any improper motive.[3] In this case, when he made his fourth try for recusal, petitioner had already been told by Judge Curtin why recusal was not appropriate. Under these circumstances, how could petitioner *not* be sanctioned under Rule 11? How could the appellate court not defer to the district court's judgment?[4]

Not one of the 12 active judges in the court of appeals felt there was any reason to question either Judge Curtin's factual finding or his exercise of discretion. The fourth recusal motion richly deserved the sanction that it received.

III. Should a record on appeal be expanded to include a record upon which a District Court judge did not rely or review, and which was offered to the District Court after its decision had been issued?

Petitioner suggests to this Court that he was denied the ability to make a record of the grounds that he asserted for the recusal of Judge Curtin. Petitioner has distorted what actually happened in the courts below. Respondent objects now, as he has objected below, to petitioner's attempt to

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practice. *See Henderson v. Department of Public Safety and Corrections*, 901 F.2d 1288 (5th Cir. 1990); *Pollitt v. General Motors, Inc.*, 894 F.2d 858, 860 (6th Cir. 1990); *Perry v. Barnard*, 911 F.2d 736 (7th Cir. 1990) (case printed in full 1990 U.S. App. LEXIS 14304, subject to Seventh Circuit Rule 53 on noncitation); *Smith v. Our Lady of the Lake Hospital*, No. 87-532-B, (M.D. La. Jan. 22, 1991), 1991 U.S. Dist. LEXIS 2626 *55-*56; *Katz v. Looney*, 733 F. Supp. 1284 (W.D. Ark. 1990), *In re Shuma*, No. 83-0889-BM (Bankr W.D. Pa. Mar. 14, 1991), 1991 Bankr. LEXIS 307 *19-*20.

3 *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, _____ U.S. _____, 111 S.Ct. 922 (1991).

4 *Cooter & Gell v. Hartmarx Corp.*, _____ U.S. _____, 110 S.Ct. 2447 (1990).

amplify the distortion by adding impermissible Appendices, which are not part of the record.[5]

The relevant orders of the district court were issued on January 26, 1990. Pet. App. 21a. On February 5, 1990, *after* his fourth recusal motion was denied and sanctioned, petitioner sought permission to add material from other cases that allegedly supported his fourth recusal motion. It is obviously significant that petitioner sought to expand the record *after* the district court had reached its decision. It is this omitted fact that completely destroys petitioner's argument about error in rulings regarding the record.

Moreover, petitioner filed his fourth motion for recusal in September of 1989. Before making that motion, petitioner had been expressly warned by the district court that he must take care in preparing the materials he would offer in support of the motion:

> If the application [sic] desires to have [matter from other cases] made part of the record in this case, that should be done specifically so that the specific reason for recusal may be set forth in one file.
>
> The court declines to search the record in the *Person* and *Markel* cases in order to determine what parts of the proceedings in those cases have application to this.

Pet. App. 27a-28a.

The responsibility for making an adequate record was with petitioner. He can blame no one but himself for his failure to heed basic rules of practice.

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5 Needless to say, Petitioner's Appendices contain only material favorable to his cause. But Petitioner's Binders further reveal that his principal allegation of bias in the *Markel* case was that Judge Curtin might "bend over backwards" in favor of Markel. *But see* Pet. Br., at 4. Petitioner also fails to mention that Ms. Markel is his sister. Of course, the Binders themselves were selectively culled from a larger—and presumably less favorable—universe of material.

IV. Can a lawyer seek disqualification of a judge who is alleged to be biased against the lawyer, where there is no possibility of bias toward a party and where the bias alleged results from an adverse ruling in an unrelated case?

Two lower courts have agreed that Senior Judge Curtin is *not* biased against petitioner, and this Court does not question a factual concurrence between two lower courts. *Texas v. Mead*, 465 U.S. 1041 (1984); *Graver v. Linde*, 336 U.S. 271, 275 (1949).

Judge Curtin said plainly that he sanctioned Petitioner for violating Rule 11, and not because he "consider[ed] Mr. Weiss' conduct a personal affront." Pet. App. 21a. The court of appeals heartily concurred:

> In fact, the record reveals that Judge Curtin treated GBP fairly *and exhibited extraordinary patience toward Weiss.*

Pet. App. 6a (emphasis supplied). Despite petitioner's vilification campaign against Judge Curtin,[6] a highly respected jurist with a life long career of public service, even petitioner does not have the temerity to impugn the integrity of the Second Circuit.

Consequently, the lower courts are in complete agreement on the basic facts—Judge Curtin was not biased against Petitioner. Bias cannot be at issue in this case, for two courts have found that it does not exist.

---

6 The Respondent's Appendix gives a flavor of the abuse heaped on Judge Curtin by Mr. Weiss. Res. App. 2a. The contents of this Appendix were not on the record compiled by the District Court, but since Petitioner inserted these contents as part of his brief on appeal to the Second Circuit, he cannot object to being buried in his own muck.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Dated: New York, New York
April 30, 1991

Respectfully submitted,

THOMAS C. BAXTER, JR.
Associate General Counsel
Federal Reserve Bank of
New York
33 Liberty Street
New York, New York 10045
(212) 720-5035

Counsel for Respondents

Of Counsel:

Ernest T. Patrikis
General Counsel

Joseph H. Sommer
Attorney

APPENDIX

APPENDIX—Inserted by petitioner on his brief to Second Circuit

THE BUFFALO NEWS

LOCAL NEWS

Monday, January 19, 1990

Curtin fines lawyer $16,065 for statements in suit

By DAN HERBECK
News Staff Reporter

A Buffalo attorney was fined $16,065 today by U.S. District Judge John T. Curtin in what is believed to be one of the biggest financial sanctions imposed by a judge against a Western New York lawyer.

Arnold Weiss was scolded for filing "immaterial, speculative and threatening" court statements in a lawsuit that was filed 12 years ago and dismissed in 1988.

"I do not take this action because I consider Mr. Weiss' conduct a personal affront," Curtin wrote in a stern 16-page decision. "Rather, I do so because I have a duty to uphold the dignity of this court, and to . . . make clear that conduct such as that displayed by Mr. Weiss in this case, which serves only to obstruct the just and efficient adjudication of cases, will neither be condoned nor ignored."

Although it could not be determined whether the fine against Weiss was the largest such sanction in local history, today's action is nearly three times as large as the $5,500 fine imposed in State Supreme Court last October against Paul W. Beltz, another Buffalo attorney.

The Beltz fine, which is being appealed, was described by the Erie County Bar Association as the largest in recent memory.

Court officials said Curtin's decision was also unusual because Weiss personally—rather than his client—was directed to pay legal fees to the other party in a lawsuit.

Weiss said today he will appeal Curtin's ruling. He accused Curtin of being "prejudiced and bigoted" against him because Weiss holds different political views than the judge and has battled in court against attorneys who are Curtin's friends.

"What you've got here is a war," Weiss said. "I'm not a liberal, and I don't dance to his tune."

"Curtin is absolutely prejudiced against me. We intend to show absolute prejudice on his part. He fined me once before and then had to reverse himself."

The $16.065 fine was ordered in connection with a 1978 lawsuit filed by Greater Buffalo Press Inc. against the Federal Reserve Bank and Marine Midland Bank.

Greater Buffalo Press, represented by Weiss, accused the Federal Reserve and Marine of breaking U.S. banking codes through the slow processing of checks. Curtin dismissed the $5.2 million suit in March 1988, and his decision was affirmed by a federal appeals court 10 months later.

In the related ruling, Curtin refused Weiss' request to remove himself from a 1989 lawsuit filed by Joseph R. Person against the General Motors Corp. In that case, Person, a black man from Cheektowaga, claims he was laid off from his job at the Saginaw Gear plant in 1987 and not rehired because of his race.

Weiss is defending General Motors in the $11 million suit, which is still pending.

Curtin said Weiss has accused him of showing in the courtroom his dislike for the attorney.

"(Weiss claims) I have given 'physical evidence' of my hostility toward him in conversations I have had with other attorneys and jurists and in my 'obvious and undisguised anger, red-faced grimaces, criticisms, impatience and hostile reaction to deponent during court appearances,' " Curtin wrote.

Curtin denied the accusations.

"Through the years, I have handled many cases in which Mr. Weiss represented various clients," the judge wrote. "A review of the record would indicate that Mr. Weiss was successful in many of the cases urged before me—not because

there was any bias on the part of the court for or against him, but simply because the facts and the law were on his side."

In the Greater Buffalo Press case, Curtin wrote, Weiss had "frequently" been given extensions of time to file court motions and Weiss slowed the progress of the case by filing "unnecessary" and "repetitious" motions.

Weiss claimed Curtin's actions today stemmed from bitterness over another, unrelated case. Weiss said Curtin removed himself from the case of Fannye Markel vs. Scoville Manufacturing Co. after Weiss raised questions about Curtin's friendship with attorney Alvin Glick, who represented Scoville.

Curtin removed himself from the Markel-Scoville case in November 1988 and turned it over to Judge Richard J. Arcara. He also dropped sanctions of $14,368 he had imposed against Weiss in 1987.

Curtin is "absolutely out to get me" because of the allegations he raised about the judge in the Markel-Scoville case, Weiss said.

"We've accused him of wrongdoing and violations of judicial conduct," Weiss said.

The judge today said he would have no comment on the situation beyond what was stated in his written decision.

The fact that he removed himself from the Markel-Scoville case should not be taken as an admission of guilt to any of Weiss' claims, nor is it a mandate to remove himself from any other cases involving Weiss, Curtin wrote.

"My decision to recuse myself from Markel was neither an acknowledgment of the legal sufficiency of counsel's motion in that case nor a suggestion that I would not be able to act without bias or prejudice in future cases involving him," Curtin wrote. "There are circumstances in which a judge may wish to recuse himself, although a legally sufficient affidavit of bias and prejudice could not be presented against him."